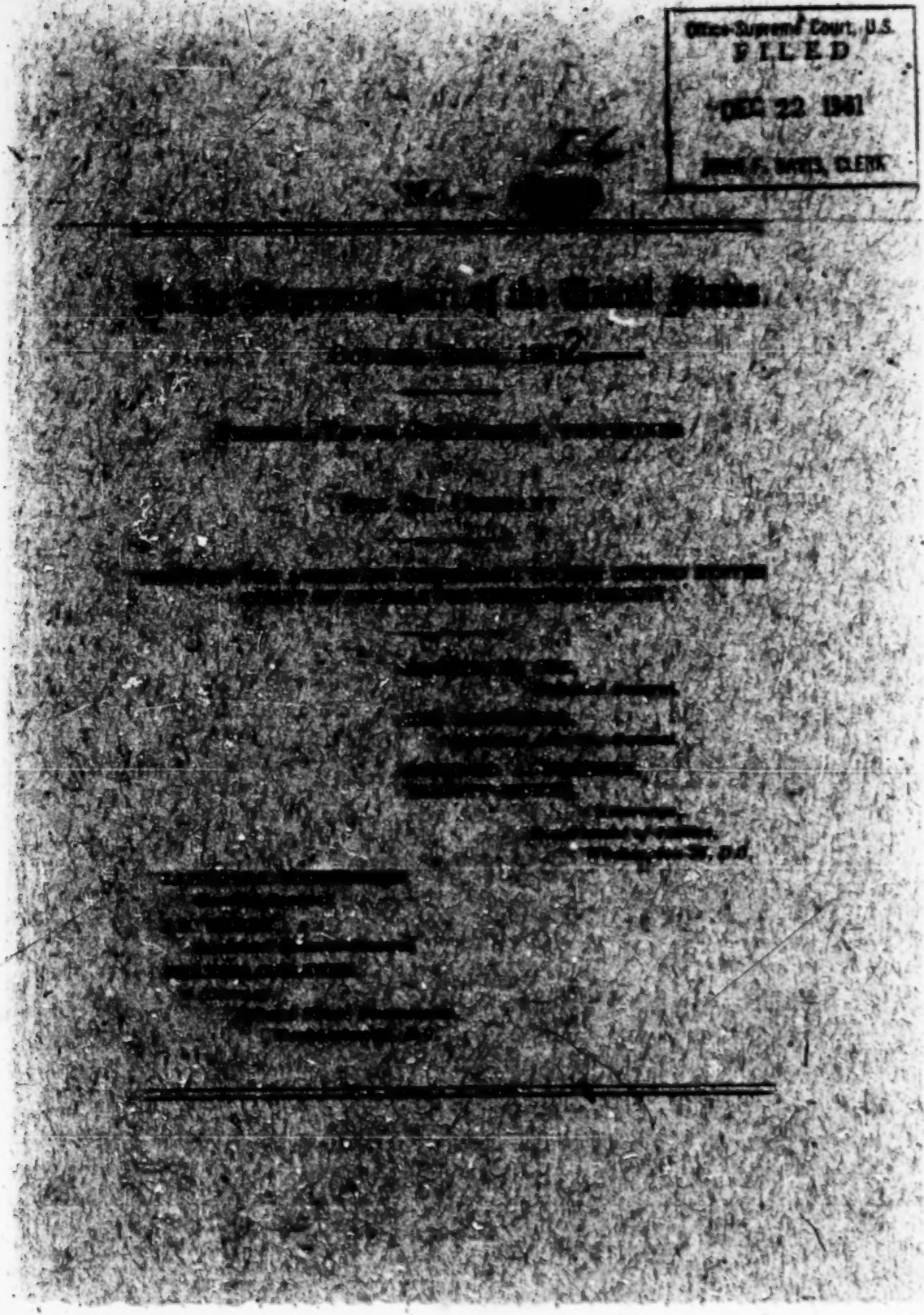
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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. —

FEDERAL TRADE COMMISSION, PETITIONER

v.

SUN OIL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit entered in the above cause on July 24, 1961.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–37a) is reported at 294 F. 2d 465. The opinions and order of the Federal Trade Commission (R. 61–73[1]; App. C, *infra*, pp. 1c–38c) are not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 1b) was entered on July 24, 1961. On October 20, 1961, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and in-

[1] "R" refers to the printed record in the court of appeals.

cluding December 22, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Section 2(b) of the Clayton Act permits a seller to rebut a prima facie case of price discrimination, in violation of Section 2(a) of the Act, by showing that the lower price was given to a purchaser in good faith "to meet an equally low price of a competitor." The question presented is whether a wholesale seller establishes this defense by showing that it gave the discriminatorily lower price to its retail customer to aid the latter in meeting the price competition of a retail competitor.

STATUTE INVOLVED

Section 2 (a) and (b) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13 (a) and (b), provides in part as follows:

> (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to in-

jure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * *

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

STATEMENT

This case involves the validity of a decision by the Federal Trade Commission holding that respondent Sun Oil Company ("Sun") violated Section 2(a) of the Clayton Act in selling gasoline by granting price concessions to one of its retail dealers in Jacksonville, Florida, that it did not give to its other dealers in the same area. The Commission held that such price discrimination was not justified under Section 2(b) of the Act as made in good faith "to meet an equally low price of a competitor." The court of appeals held that Sun had established a defense under Section 2(b) and set aside the Commission's

cease-and-desist order. The facts relevant to these issues are not in dispute.[2]

Sun is a major integrated producer-distributor of petroleum products, including gasoline (R. 35–36). It does not ordinarily distribute these products directly to the public at retail, but through independent service station operators who lease their facilities and purchase their gasoline for resale from Sun (R. 35–36). Under this system of distribution, the expenses of operating the retail service stations and the risk of profit or loss in the retail operation rest with the service station proprietor rather than with Sun.

At the time of the events in question there were 38 service station proprietors selling Sun products in the Jacksonville, Florida, area (R. 35), which Sun divided into three sales territories (R. 37). One of these dealers was Gilbert V. McLean; he operated in a sales territory comprising eight stations (R. 36, 37). In June 1955 McLean and the other Sun dealers in his territory were purchasing gas from Sun at 24.1¢ per gallon for Sun's regular gasoline, and retailing it at 28.9¢ (R. 36, 37, 51).

In the same month the Super Test Oil Company opened a service station, selling gasoline under its own brand name, diagonally across the street from McLean (R. 36). The record does not indicate the extent, if

[2] The Commission also found that Sun had violated Section 5 of the Federal Trade Commission Act by entering into an illegal resale price-maintenance agreement with the particular dealer to whom it gave the price concessions. The court of appeals set aside that finding as not supported by substantial evidence. We are not seeking review of that ruling.

any, to which Super Test operates other than as a retailer or from what source it secures its gasoline, although there is some indication it operates more than one service station (R. 495–497). During most of the period between June and December 1955, Super Test sold its regular gasoline at 26.9¢ per gallon, 2¢ less than the price at which McLean was selling Sun's regular gasoline (R. 36). Since Super Test was a so-called "non-major" or "independent" brand of gasoline, as compared with the "major" name brands of which Sun was one (R. 36), this price differential at which Super Test sold did not adversely affect McLean's competitive position (R. 99, 125). On a number of occasions, however, generally on week ends, the Super Test station substantially cut the price of its gasoline, to as low as 21.9¢ per gallon (R. 36). On each of these occasions McLean's sales of Sun's gasoline at 28.9¢ declined substantially (R. 36).

McLean complained to Sun about the inroads on his business resulting from Super Test's price cutting and sought relief in the form of a reduction in the price he was paying Sun (R. 36, 99, 101). At first Sun did nothing, but in late December it advised McLean that, if Super Test reduced its price again, Sun would come to his assistance (R. 51, 103). On December 27, 1955 Super Test cut its price from 26.9¢ to 24.9¢ and, pursuant to the previous understanding, Sun the same day gave McLean a price allowance or discount of 1.7¢ per gallon. McLean then cut the price of his regular gasoline by 3¢, from 28.9¢ to 25.9¢ (R. 36, 109, 111). Super Test within the next day or two reduced its

price for regular gasoline to 23.9¢ (R. 127, 133), a figure which it maintained until February 16, 1956, when it cut its price further to 22.9¢ (R. 509). This was reduced to 19.9¢ on February 28, 1956 (*ibid.*).

Prior to December 27, 1955, when Sun gave McLean the 1.7¢ price allowance, none of the other Sun dealers in the Jacksonville area had ever complained that they were being injured by Super Test's price cutting practices. However, after Sun gave McLean the 1.7¢ price allowance, four of the other Sun dealers in McLean's sales territory, operating stations located at distances varying from less than a mile to approximately three and one-half miles from McLean's station (R. 64, 65), lost business as a result of the price allowance granted McLean. At least three of them complained to Sun and asked Sun to give them equal price allowances (R. 39, 40, 44). Sun, however, refused to do so until mid-February 1956 when, after a general price war had broken out in the Jacksonville area and other major gasoline suppliers had already lowered their prices to their dealers, Sun reduced the prices at which it sold its gasoline to all its dealers in the area (R. 37).

As a result of the price allowance given to him by Sun and the lower prices at which he sold at retail, McLean's sales substantially increased (R. 37, 53). During the same period the sales of the three complaining Sun dealers substantially diminished (R. 64–65) and a fourth dealer testified to the loss of specific customers to McLean (R. 66). However, on February 18, 1956, despite the increase in sales, Mc-

Lean, who had cut his profit margin by 1.3¢ per gallon, went out of business (R. 69).

On September 26, 1956 the Commission instituted these proceedings by a complaint charging Sun with violations of both Section 2(a) of the Clayton Act and Section 5 of the Federal Trade Commission Act (R. 17). After full hearings the examiner issued an initial decision (R. 32), concluding that Sun had violated both statutes as charged, and proposing a cease-and-desist order (R. 58). The examiner rejected Sun's defense that its granting of the preferential discount to McLean had been a good faith effort to meet an equally low price of a competitor, on the ground that "the proviso in 2(b) has reference to the good faith meeting of competition of the seller, and not the competition of the buyer, as in this case" (R. 46).

On appeal, the Commission affirmed, adopting the examiner's findings and order (R. 61). With respect to the Section 2(b) defense, the Commission stated (R. 67–68):

> The discount given by respondent to McLean was not made to meet a lower price made to the latter by another supplier. It was given to enable McLean to meet the competition of the Super-Test station across the street. Respondent would justify broadening the proviso of Section 2(b) to cover this situation on the theory that respondent and its dealer McLean were, in fact, competing as a unit with other channels of competition.
>
> As pointed out by the hearing examiner, this argument goes beyond the plain wording of the proviso which has reference to the good

faith meeting of competition of the seller, rather than that of the buyer.

The Court of Appeals for the Fifth Circuit reversed. It held (App. A, *infra*, p. 32a) that, since the gasoline sold by Sun was in competition with the gasoline sold by Super Test, and since Sun marketed its gasoline through an independent filling station which was in direct competition with the Super Test station, Sun was in competition with Super Test and is "entitled to assert the defense of meeting competition in good faith." It rejected the Commission's view—which it recognized was supported by the only prior judicial decision[3]—as "unnecessarily narrow, unrealistic in terms of the facts of life in marketing gasoline, and inconsistent with the purposes of the Robinson-Patman Act" (*id.* at 10a). The court "recognized that some dealers may suffer a diversion of business when the supplier lowers its price to meet competition" (*id.* at 17a). The court concluded, however, that "[t]aking a coldly objective view of this case, one would have to say that, regardless of some injury to certain Sun dealers, Super Test's price cutting and Sun's response of making an allowance to McLean benefitted consumers and the competitive process in at least two ways: by promoting competition at the retail level and by providing an opportunity for a major to break away from a uniform pricing system characteristic of an oligopolistic industry such as the oil industry" (*id.* at 18a, footnotes omitted).

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[3] *Enterprise Industries, Inc.* v. *Texas Co.*, 136 F. Supp. 420 (D. Conn.), reversed on other grounds, 240 F. 2d 457 (C.A. 2), certiorari denied, 353 U.S. 965, discussed *infra*, pp. 10–11.

REASONS FOR GRANTING THE WRIT

This case presents an important question concerning the meaning of the defense provided by Section 2(b) of the Clayton Act where a seller's discriminatory lower price is "made in good faith to meet an equally low price of a competitor." The court of appeals held that the defense is available when the purpose of the seller in lowering its price to a particular buyer is not to meet the equally low price which one of its own competitors has offered to the buyer, but to enable the buyer to meet the lower price at which one of the buyer's competitors is selling. We submit that the court of appeals has thereby expanded the Section 2(b) defense in a way that is not justified by, but is indeed contrary to, the language and the legislative history of the statute and the pertinent judicial decisions. The court's attempt to give the defense a "broad and simple construction" that recognizes "the facts of life in marketing gasoline" (App. A, *infra*, pp. 32a, 10a), while perhaps superficially plausible, in actuality produces a result that is contrary to the basic purpose of the Robinson-Patman Act to protect small businesses from discriminatory price cutting by large and powerful firms.

1. Section 2(b) permits a seller to rebut a prima facie case of price discrimination "by showing that his lower price * * * was made in good faith to meet an equally low price of a competitor." A "competitor" of a seller is one who is attempting to sell to the same customer as the seller. Normally "competing" producers or wholesale distributors are those attempting to sell their products to the same retail outlets. Con-

ceivably wholesale sellers could be said to be "competitors" where they are attempting to have their goods reach the same ultimate consumers. But the seller who grants a discriminatorily lower price in order to enable the retailer-*buyer* to compete with the lower prices of the buyer's competitor is not meeting the lower price of a "competitor" of the seller. As the Commission pointed out (R. 67):

> The discount given by respondent to McLean was not made to meet a lower price made to the latter by another supplier. It was given to enable McLean to meet the competition of the Super-Test station across the street.

The same construction was given Section 2(b) by the only other court that has considered the issue. *Enterprise Industries, Inc.* v. *Texas Co.*, 136 F. Supp. 420 (D. Conn.), reversed on other grounds, 240 F. 2d 457 (C.A. 2), certiorari denied, 353 U.S. 956. In that case a Texaco service station alleged that the oil company had violated Section 2(a) by selling gasoline to other Texaco dealers in the area at lower prices. The district court found that a prima facie case had been established under Section 2(a), and rejected the proffered Section 2(b) defense on the ground, among others, that "[t]here is no evidence that the price charged any of the competing [favored] dealers was not lower than a lawful price at which gas was offered to the dealers by other refiners" (136 F. Supp. at 421). The court stated (*ibid.*, emphasis in original):

> Moreover, Texas could justify discrimination only by a showing that it dropped its price to

the other stations to meet an equally low price made available to those other stations by a competing oil company. In view of the short term station and equipment leases in effect with some stations, perhaps it is a fiction to speak of price competition at the oil company sale to the station level. That is the competitive level at which the justification is provided for defendant in the Act however. The Act does not go so far as to allow discriminatory price cutting to enable a *buyer* to meet price competition, but only to enable the seller to meet a lawful price of the *seller's* competitor. The end effect is the same, perhaps, but the scheme adopted by Texas allows it, without first determining the price offered by its competitor, a flexibility that could result in undesirable discrimination between purchasers from Texas. The defense is not established.

2. The legislative history of Section 2(b) supports the view that the Section 2(b) defense does not permit a seller to meet the competition of his buyer's competitor. That history is thoroughly canvassed in the majority and minority opinions in *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231. As there noted (pp. 247, n. 14, 256), Congress passed the Robinson-Patman Act because it believed that the broad provision in the original Clayton Act which permitted price discriminations "made in good faith to meet competition" had seriously weakened the effectiveness of that Act in preventing predatory discriminatory pricing. See S. Rep. No. 1502, 74th Cong., 2d Sess., p. 4; 80 Cong. Rec. 3113, 3119. Because of this concern, the original bills proposed to eliminate the meet-

ing-competition defense. See H.R. 8442, 74th Cong., 1st Sess., S. 3154, 74th Cong., 1st Sess. The House Committee, in reporting out the bill, did not go that far. Instead, it recommended a "contraction" (H. Rep. No. 2287, 74th Cong., 2d Sess., p. 16) of the scope of the defense and, insofar as price discrimination is concerned, it proposed the language now in Section 2(b). It explained that this language "permits the seller to meet the price actually previously offered by a local competitor. It permits him to go no further" (*ibid.*). In the *Standard Oil* case, *supra* at 242 (emphasis added), this Court explained that the amendment left only "the actual core of the defense. That still consists of the provision that *wherever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain that customer,* may in good faith meet that lower price. Actual competition, at least in this elemental form, is thus preserved."

In other words, the narrow exemption that Congress provided by the Section 2(b) defense protects only the right of a seller to retain its own customer where loss of that customer is threatened by "a lawful lower price of a competitor" of the seller. There is nothing in the legislative history, however, that indicates or even suggests that Congress intended the proviso to permit price discriminations aimed at meeting a seller's competition generally. Such a result would be to reinstate the broad provision of the original Clayton Act which Congress intended sharply to curtail in the Robinson-Patman Act.

3. Other statements in the *Standard Oil* case further support the view that Section 2(b) sanctions only the meeting of the competition of another seller who is attempting to take away a customer. The Court there stated (340 U.S. at 244) that in its earlier opinion in *Federal Trade Commission* v. *Staley Manufacturing Co.*, 324 U.S. 746, "[t]he discussion proceeds upon the assumption * * * that if a competitor's 'lower price' is a lawful individual price offered to any of the seller's customers, then the seller is protected, under § 2(b), in making a counteroffer provided the seller proves that its counteroffer is made to meet in good faith its competitor's equally low price." The Court in *Standard Oil* then went on to state (pp. 249-250, emphasis added) that where "a large customer requests his seller to meet a temptingly lower price offered to him by one of his seller's competitors," "[t]here is * * * *plain language* and established practice *which permits a seller, through § 2(b), to retain a customer* by realistically meeting in good faith the price offered to that customer, without necessarily changing the seller's price to its other customers." See also *id.* at 242.

4. The court of appeals concluded that a "broad and simple" construction of Section 2(b) was justified because of the peculiar organization of the oil industry (App. A., *infra*, p. 32a). The court viewed the independent service station operator as a mere "conduit" between the supplier and the motorist (*id.* at 24a) and concluded that there is normally no competition between suppliers for the business of particular retail out-

lets.[4] But in a real sense all producers of consumer goods are distributing their product to the public through the conduit of retail outlets, which may or may not handle the products of competing suppliers. Where, as here, the retailer's business is not sought by the suppliers of competing products, the Section 2(b) defense protecting suppliers against losing retailer customers to price cutting competitors is not applicable. But this fact does not justify converting the proviso into the broad "meeting competition" defense, which Robinson-Patman specifically narrowed. This Court in *Standard Oil Co.* v. *United States*, 337 U.S. 293, 312, rejected the view that the specific organization of the oil industry could affect the applicability of the "narrowly directed" provisions of Section 3 of the Clayton Act. The same reasoning is applicable here.[5]

5. The court of appeals was of the view that the kind of price discrimination in which Sun here engaged "benefitted consumers and the competitive process in at least two ways: by promoting competition at

[4] The court of appeals assumed that Super Test was a partially integrated "supplier-retailer," and that Sun, a supplier, was thus competing, through its independently operated service stations, with the retail outlets owned by Super Test (see App. A, *infra*, pp. 4a, 14a, 17a, 32a). As shown *supra*, pp. 4–5, the evidence of record does not indicate that Super Test was anything more than a retailer. But this factual error does not appear to be material to the court of appeal's basic position, since Super Test either was a supplier-competitor of Sun's or purchased its gasoline from such a supplier. In either case Sun could, under the court's rationale, be said to be reducing its price to McLean to meet its competition.

[5] The court below relied upon a dissenting opinion in the *Standard Oil* case.

the retail level and by providing an opportunity for a major to break away from a uniform pricing system characteristic of an oligopolistic industry such as the oil industry" (App. A, *infra*, p. 18a). We believe that, viewed realistically and from a somewhat longer range viewpoint, the likely effect of the decision below is precisely the opposite. It will not protect, but will injure, competition at the retail level; and it will not provide an opportunity for a major to "break away" from the price uniformity that generally characterizes the retail distribution of gasoline, but will tend to hinder the development of any real and permanent price competition in that segment of the industry.

The court of appeals' construction of Section 2(b) gives the majors a new and potent weapon in fighting price-cutting independents. They can now engage in selective price warfare against the individual outlets of the independents, conducted through selected service stations and at the inevitable expense of their other service stations in the same area (see the Statement, *supra*, p. 6). The independents cannot hope to compete successfully with the majors on such terms; they will be coerced into avoiding price competition; and the inevitable long term result will be further to rigidify the price structure in the industry.

Thus, the ultimate effect of the court of appeals' interpretation of Section 2(b) is to protect the majors' retail markets against the price competition of independents. The Commission's interpretation, on the other hand, while it leaves the majors free to reduce prices uniformly to meet competition, has the

practical effect not only of protecting the majors' retailer outlets against discrimination, but also of safeguarding the smaller independent companies against purely predatory price-cutting at one or two stations. As such, the Commission's interpretation is plainly the more consonant with the basic purpose of the Robinson-Patman Act.

Although the court of appeals dealt with the statutory question in terms of the particular distribution practices of the oil industry, the legal issue is not thus limited. The question affects all segments of American industry in which retail outlets handle the products of only a single producer. The meaning of the Section 2(b) defense has been the subject of considerable discussion and uncertainty.[6] An authoritative interpretation would aid both the Commission and business by further defining the limits that the Robinson-Patman Act imposes upon price discrimination.

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[6] Note, *The Good Faith Defense of the Robinson-Patman Act: A New Restriction Appraised*, 66 Yale L.J. 935 (1957); Austin, *Price Discrimination and Related Problems under the Robinson-Patman Act* (2d rev. ed. 1959), pp. 93–104; Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), pp. 179–186; S. Rep. No. 2810, 84th Cong., 2d Sess., pp. 19–23; H. Rep. No. 2966, 84th Cong., 2d Sess., pp. 76–82. The decision of the court of appeals in the present case is discussed in 75 Harv. L. Rev. 429 (1961) and 47 Va. Law Rev. 1229 (1961).

CONCLUSION

The question is an important one in the administration of the Clayton Act, which this Court should decide. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1961.

APPENDIX A

In the United States Court of Appeals for the Fifth Circuit

No. 17658

SUN OIL COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

PETITION TO REVIEW ORDER OF THE FEDERAL TRADE COMMISSION

(July 24, 1961)

Before JONES, BROWN, and WISDOM, *Circuit Judges*

WISDOM, *Circuit Judge:* This controversy between Sun Oil Company, petitioner, and the Federal Trade Commission was generated by a price battle between two filling stations. The issues relate to an alleged secondary-line price discrimination violative of the Robinson-Patman Act and the Federal Trade Commission Act. The key question is whether the defense of meeting competition in good faith is available to a supplier of gasoline when the supplier reduces the wholesale price of its gasoline to one of its filling stations engaged in a price battle at the consumer level with a station owned and operated by a competing supplier. We hold for the petitioner.

Sun, a major oil company, refines, sells, and distributes gasoline throughout the United States. It sells only one grade, Blue Sunoco. In 1955 Gilbert McLean, one of Sun's thirty-eight retail dealers in

Jacksonville, Florida, operated a filling station on the corner of 19th and Pearl streets in Jacksonville.[1] McLean was an independent contractor[2] but, like virtually all filling station operators, he sold gasoline purchased from only one supplier. He bought gasoline from Sun Oil Company at 24.1 cents a gallon and sold it at 28.9 cents a gallon, then the prevailing price in the Jacksonville area for gasoline sold under a major supplier's brand. Late in June 1955 Super Test Oil Company, a "non-major"[3] competitor of

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[1] Sun divided Jacksonville into three sales territories. McLean and seven other dealers were located in the territory consisting roughly of the north one-third of Duval County. The examiner found that the pattern of traffic flow in this sales territory was such that motorists traveling from northern and northwestern Duval County to the downtown Jacksonville area had ready access to all of these stations.

[2] "Service stations today may be divided into five groups and the number in each roughly estimated as follows: (1) over 3,000 owned by suppliers and run by salaried managers; (2) about 8,000 of the new and rapidly growing 'commission-type' stations run as independent businesses except that they buy their gasoline on consignment, thus giving the supplier control over prices; (3) some 90,000, more or less, which are leased by the supplier—usually a refiner, but often a jobber and occasionally the owner of a chain of stations—to the operator, subject to cancellation for unsatisfactory performance; (4) perhaps 15,000 or 20,000 leased by the dealer from a third party; and (5) the remaining 60,000 or so which are on land and premises owned by the dealer himself. Types (4) and (5) are the 'independent' or 'contract' stations whose operators merely buy their gasoline, and usually other products, on contract from their suppliers." Whitney, 1 Antitrust Policies—American Experience in Twenty Industries 125 (Twentieth Century Fund, N.Y. 1958).

[3] The line between a "major" and a "non-major" oil company or "independent" is not well-defined. A major oil company is usually integrated in that it operates on the four functional levels of production, transportation, refining, and marketing. Generally, a non-major does not own its refinery,

Sun's, opened a filling station across the street from McLean's station and began selling Super Test "regular" gasoline at 26.9 cents a gallon, then the prevailing price in Jacksonville for off-brand gasoline. McLean testified that he was not hurt competitively as long as the differential between Sunoco and Super Test was two cents.[4] In August the Super Test station commenced a series of price cuts which were advertised on curb signs in front of the station and also in the newspapers. August 27 Super Test dropped its posted price to 21.9 cents a gallon and August 28

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or if it does, the refinery is usually small. The non-major usually owns and operates its filling station. The off-brand gasoline a non-major sells has a lower octane rating than a name-brand gasoline. Super Test had an octane rating of 87.5 as against Sunoco's rating, in 1955, of 92.5. There are about twenty vertically-integrated but not self-contained majors.

[4] "Private brands generally come to rest at a differential around 2 cents at retail below major brands." de Chazeau and Kahn, Integration and Competition in the Petroleum Industry 466 (Yale U. Press, 1959). In a case study of a price war in Philadelphia the author states. "The Sun management believed that a branded gasoline could effectively compete with a non-branded gasoline which sold for only one to two cents less." Comment, Competition in Gasoline Retailing: A Price War, 101 U. of Pa. L. Rev. 643, 645 (1953). In the instant case the Sun official in charge of market research testified that it was not unusual to find markets where the differential is only one cent; that in a sub-normal market, such as a price war, the pattern has been for the majors to post prices within one cent of the non-majors. The examiner regarded this as evidence of predatory pricing to whip non-majors into line; Sun insists that the dealer posts whatever price *he* chooses, and that in a price war a dealer tries to protect himself by posting a price with a one cent differential.

The determination of a sound differential is made more difficult when, as in the instant case, the non-major gives trading stamps. Sun officials regard such a practice as equivalent to a further reduction of one cent in the price of gasoline.

dropped its price to 20.9 cents a gallon. Then and later, whenever Super Test cut its prices McLean's sales declined substantially.[5] On a number of occasions, after reducing prices and gaining customers at McLean's expense, Super Test reestablished the customary two-cent price differential between its gas and Sunoco. On at least one occasion Super Test maintained its low price for a week.

McLean and Super Test competed for gallonage with McLean always the loser. He was a sitting duck. Super Test, a vertically integrated company[6] operat-

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[5] The monthly gallonage was:

	McLean	Supertest	
		Regular	Premium
June 1955	7,145	------	-----
July 1955	7,466	5,047	1,329
August 1955	6,735	15,300	4,292
September 1955	6,400	10,694	2,693
October 1955	6,495	10,925	2,648
November 1955	5,946	11,066	2,398
December 1955	8,368	18,906	3,954
January 1956	32,115	61,672	7,890
February 1956	------	67,156	8,520

McLean's December and January figures reflect the increase in sales after Sun's allowance of 1.7 cents on December 27, 1955. McLean's daily sales in February 1956, until he went out of business February 18, averaged about the same as January sales.

On August 26, 1955, when Super Test's regular gas was posted at 26.9 its station sold 127 gallons plus 21 gallons from the truck pump; on August 27, when the price dropped to 21.9, the station sold 3,583 gallons plus 263 from the truck pump, and 1,324 of ethyl (at 23.9). On August 28, when the price was cut to 20.9 for the regular, Super Test sold 4,931 gallons plus 278 from the truck pumps, and 1,611 gallons of ethyl. On August 29, when the Super Test price went up again to 26.9 and 28.9, the station sold 408 gallons of the regular plus 38 from the truck pump, and 137 gallons of ethyl.

[6] "All of the largest companies and many of the smaller ones are integrated vertically. Though the physical flow of oil from well to user may be almost continuous, the sequence of operations traditionally falls into a number of broad categories * * *. Vertical integration occurs when the activities of a single com-

ning its own filling stations, could fix any retail price it pleased; McLean's price to the public was dependent on Sun's price to him. The Examiner found that McLean made it clear to Sun that unless something

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pany span two or more of these stages." de Chazeau & Kahn, Integration and Competition in the Petroleum Industry, p. 19 (Yale U. Press, 1959). Vertical "integration appears in many contexts"; it is "the combination under single ownership of successive stages in a particular cycle of production." Rostow, Entry into the Oil Refining Business: Vertical Integration, 61 Yale L. J. 856, 860, 878 (1952). For a comprehensive study of integration in the petroleum industry, in addition to de Chazeau and Kahn, see McLean and Haigh, The Growth of Integrated Oil Companies (Boston, Harvard Business School, 1954).

"During the 1920's the major oil companies expanded their direct operation of service stations; but retail price cutting after 1929 began to reveal weaknesses in this policy. Independent stations took business away from company stations because they could cut prices on shorter notice, with less risk of ill will, and without violating the Clayton Act or one-price laws in a number of states. Between 1933 and 1934 the number of stations owned by eighteen majors was reduced from 125,327 to 98,246, and by 1935 it was only 75,547. The new factor which became effective in 1935 was Iowa's severe tax on chain stores, including stations. Standard of Indiana at once leased out to their operators all its stations in the state, and this 'Iowa plan' quickly spread to other refiners and other territories. Besides escaping the chain store tax, which seven states had adopted at the end of 1939, the refiners were glad to be relieved of responsibility for service station employees, who were now being organized into unions and covered by social security and wage and hour legislation.

"The number of refiner-operated stations continued to decline, amounting to only about 3,000 [less than 2%] in 1956. Although some majors still keep a core of salaried dealers, most of them have retained only a few selected locations to use as models or experimental and training plants, and for the profit of their concentrated, high-volume sales." Whitney, 1 Antitrust Policies 125 (1958). Here, Sun's integration stopped short of retailing through company-owned stations.

could be done to meet the Super Test competition he would be forced out of business. In the four months following Super Test's August "Grand Opening Special" McLean repeatedly asked Sun to reduce its wholesale tank-wagon price to him to a level that would allow Sunoco to compete with Super Test. Sun carefully considered the situation, but for four months gave no price allowance to McLean.

The week-end of December 3, 1955 Super Test dropped its price to 21.9 cents a gallon. A few days later the price went up again but after a short lull, with Sunoco still at 28.9 cents a gallon and Super Test at 26.9 cents a gallon, Super Test dropped its price to 24.9 cents a gallon. This was the last straw. McLean told Sun's regional manager that he was going out of business. The manager reported to his home office that the situation was "desperate." McLean informed the manager that to meet the competition he would have to post a price of 25 cents a gallon, but he could not afford to do so unless Sun gave him some relief. He followed this with a request by letter for assistance that would enable him to sell at 1.8 cents a gallon above the posted dealer tank-wagon price of 24.1 cents a gallon.[1] December 27, 1955, Sun gave a discount to

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[1] The letter, dated December 27, 1955, read, in accordance with a company form: "Please be advised that I am confronted with a depressed retail gasoline price situation which has affected my business * * *. In order to meet this competition, it will be necessary for me to sell Blue Sunoco gasoline at a retail service station price that is 1.8 cents per gallon above the posted dealer tankwagon price at which I now purchase same under my Dealer's Agreement.

"Therefore, I am requesting assistance from you to help me in meeting these competitive conditions."

McLean of 1.7 cents a gallon.[5] Sun reached this decision after a study of gallonage records of its Jacksonville dealers and a report from its regional manager, familiar with the local situation, led it to conclude that only McLean was affected adversely by Super Test's price-cuts and a price allowance could be made to McLean to put Sunoco on a competitive level with Super Test at 19th and Pearl streets without adversely affecting any other Sun dealer in Jacksonville.[6] McLean cut his price three cents, to 25.9 cents, thereby absorbing 1.3 cents of the cut and reducing his normal gross profit from 4.8 cents to 3.5 cents. Sun officials and McLean testified that there was no agreement or understanding to fix his retail price. The Examiner found, however, that there was such an agreement. The next day or one day thereafter Super Test reduced its price to 23.9 cents, reestablishing the 2-cent differential. McLean maintained his price at 25.9 cents and kept it there until he went out of business. Shortly after Sun reduced its tank-wagon price to McLean, other dealers in the Jacksonville area complained about not being given the same allowance. Then, February 16, 1956, what had been a skirmish on the corner of 19th and Pearl became a full-scale price war in the Jacksonville area. February 16 Super

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[5] Sun's policy is to make certain that an operator grosses at least 3.5 cents a gallon. Sun considers this the minimum margin on which a dealer can exist. 3.5 is 1.3 cents less than McLean's usual profit of 4.8 cents. Since McLean elected to reduce his posted price to 25.9 cents a gallon, a drop of 3 cents, it was requisite that the company allow 1.7 cents in order for him to gross 3.5 cents.

[6] Four of the seven other Sun dealers in the same sales territory as McLean testified. The Examiner found that these dealers were in substantial competition with McLean and that they were competitively injured by the price allowance granted McLean

Test lowered its price to 22.9 cents for its regular gasoline and 25.9 cents for ethyl. Then, after several major suppliers reduced their tank-wagon price, Sun dropped its tank-wagon price to all of its dealers in the area.

Sun's price allowance to McLean on December 27, 1955, came too late to help him. February 18, 1956, he went out of business. It was just as well: February 28, Super Test cut its regular gasoline to 19.9 cents and its ethyl to 22.9 cents.

September 28, 1956, the Federal Trade Commission filed a complaint against Sun charging it with having violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act,[10] by selling gasoline to

[10] 49 Stat. 1526 (1936), 15 U.S.C. §§ 13–13b, 21a, Section 2(a) provides: "[I]t shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or any other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered * * *."

Section 2(b) provides: "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation

McLean at a lower price than Sun charged other retail dealers in the same market area. In defense, Sun asserted that the allowance to McLean was a good faith price reduction to meet competition, as permitted under Section 2(b) of the Robinson-Patman Act. The complaint charged also that Sun violated Section 5 of the Federal Trade Commission Act by conspiring with McLean to fix the retail price of Sunoco at McLean's station.[1] Sun denied this charge. The Commission, adopting in full the Hearing Examiner's findings and conclusions, issued a broad order against Sun, directing it to cease and desist from discriminating in prices; the order applies not only to the sale of gasoline but also to the sale or distribution of any Sun products. On Sun's petition to review and set aside the Commission's cease and desist order, we grant review and set aside the order.

I

The Commission contends that the defense of meeting competition is available to a seller only to meet direct competition for the business of his customer; that Sun could reduce its price to McLean only if Super Test offered gasoline to McLean at prices cheaper than Sunoco. Here, however, so the Commission argues, the seller granted a price reduction to a favored dealer in order to help *that* dealer meet

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of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing contained [herein] shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price * * * to any purchaser * * * was made in good faith to meet an equally low price of a competitor. * * *"

[1] 38 Stat. 719 (1914) as amended by 52 Stat. 111 (1938), 15 U.S.C.A. § 45.

his retail competition.[12] Respect for a federal agency's unquestioned expertise does not require the Court to abdicate its judicial responsibility of construing the statute in the factual setting, strongly as counsel for the Commission argues that the weight to be given the facts and inferences is for the Commission.[13] We consider the Commission's construction of the Act unnecessarily narrow, unrealistic in terms of the facts of life in marketing gasoline, and inconsistent with the purposes of the Robinson-Patman Act.

Section 2(a) of the Robinson-Patman Act requires a seller to charge uniform prices to competing purchasers; proof of a price discrimination establishes a prima facie violation of Section 2(a). "[A] price discrimination within the meaning of that provision is merely a price difference." *Anheuser-Busch, Inc.* v. *Federal Trade Commission*, 1960, 363 U.S. 536, 80 S.

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[12] The hearing examiner stated merely that "the proviso in Section 2(b) has reference to the good faith meeting of competition of the seller, and not the competition of the buyer as in this case." The Commission opinion simply states: "The discount given by respondent to McLean was not made to meet a lower price made to the latter by another supplier. It was given to enable McLean to meet the competition of the Super-Test station across the street. Respondent would justify broadening the proviso of Section 2(b) to cover this situation on the theory that respondent and its dealer McLean were, in fact, competing as a unit with other channels of competition. As pointed out by the hearing examiner, this agreement goes beyond the plain wording of the proviso which has reference to the good faith meeting of competition of the seller, rather than that of the buyer."

[13] See footnote 42. See Comment, The New Federal Trade Commission and the Enforcement of the Antitrust Law, 65 Yale L. J. 34, 81–85 (1955). See also Schwartz, Legal Restriction of Competition in the Regulation Industries: An Abdication of Judicial Responsibility, 67 Harv. L.R. 436, 471–475 (1954).

Ct. 1267, 4 L. Ed. 2d 1385. However, as the Seventh Circuit pointed out in Anheuser-Busch on remand, the "Supreme Court, at 553, disclaimed any flat prohibition of price differentials, recognizing that price differentials constitute but one element of a Section 2(a) violation". *Anheuser-Busch, Inc.* v. *Federal Trade Commission*, 1961, * * * F. 2d * * *. Other parts of the statute allow price reductions which meet established criteria; the Act clearly "places emphasis on individual competitive situations".[14]

Section 2(b), on which Sun relies, allows a seller, in an individual competitive situation, to rebut a prima facie violation of Section 2(a) by showing that his "lower price * * * was made in good faith to meet an equally low price of a competitor". This proviso creates a substantive defense or "justification" that overrides the importance of any competitive injury and is absolute in nature.[15] The Section 2(b) defense raises a question of fact in each case as to whether the competition justifies the discrimination.[16]

In holding the defense of meeting competition inapplicable, the Examiner and the Commission relied

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[14] *Federal Trade Commission* v. *Staley*, 1945, 324 U.S. 746, 753, 65 S. Ct. 971, 89 L. Ed. 1338.

[15] *Standard Oil Co.* v. *Federal Trade Commission*, 1951, 324 U.S. 746, 71 S. Ct. 240, 95 L. Ed. 239.

[16] "Prior to the Robinson-Patman amendments, § 2 of the Clayton Act provided that nothing contained in it 'shall prevent' discriminations in price 'made in good faith to meet competition.' The change in language of this exception was for the purpose of making the defense a matter of evidence in each case, raising a question of fact as to whether the competition justified the discrimination. See the Conference Report, H. Rep. No. 2951, 74th Cong., 2d Sess., pp. 6, 7; see also the statement of Representative Utterback, the Chairman of the House Conference Committee, 80 Cong. Rec. 9418." *Federal Trade Commission* v. *Staley Mfg. Co.*, 1945, 324 U.S. 747, 752, 65 S. Ct. 971, 89 L. Ed. 1338.

on *Enterprise Industries, Inc.*, v. *Texas Co.*, D.C. Conn., 1955, 136 F. Supp. 421; rev'd on other grounds, 2 Cir., 1957, 240 F. 2d 457; cert. den., 1957, 353 U.S. 965, 77 S. Ct. 1048, 1 L. Ed. 2d 915. There is no other reported case directly in point.[17]

In Enterprise the plaintiff operated a Texaco station selling gasoline purchased only from the defendant, Texas Company. The plaintiff's station, near Hartford, Connecticut, on a well-traveled interstate highway, competed with other stations on the highway for the business of transient motorists, and it also competed for local business with nine stations off the highway selling Texaco. Hartford gas stations were in a price war. Texas Company, under the spur of declining sales, made price allowances to both local and highway Texaco dealers in the gas war area on condition that they match (but not undercut) the prices of their competitors selling rival brands. The amount of the allowance depended on the prevailing neighborhood price. The price in Hartford was lower than it was on the highway, so that Texas Company sold to its Hartford dealers at a lower price than it sold to the plaintiff. The plaintiff sued for treble damages for price discrimination under Section 2(a). The district court rejected the meeting competition defense, holding that by granting a price differential between purchasers who competed with each other

[17] The Commission filed complaints in two actions that are similar to the complaint filed against Sun. Both these matters are still pending before the Commission. The Pure Oil Co., F.T.C. Dkt. 6640 (1956); The Texas Co., F.T.C. Dkt. 6898 (1957).

Texas Company violated Section 2(a) of the Robinson-Patman Act.[18] The district court stated:

> Moreover, Texas could justify discrimination only by a showing that it dropped its price to the other stations to meet an equally low price made available to those other stations by a competing oil company. In view of the short term station and equipment leases in effect with some stations, perhaps it is a fiction to speak of price competition at the oil company sale to the station level. That is the competitive level at which the justification is provided for defendant in the Act however. The Act does not go so far as to allow discriminatory price cutting to enable a buyer to meet price competition, but only to enable the seller to meet a lawful price of the seller's competitor (136 F. Supp. 421).

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[18] In Enterprise the district court pointed out that the burden was on Texas Company to prove the price of its competing refiner. There was no evidence of such price and none that the Texas Company's prices were not *lower* than its competitors. Further, there was no evidence that the prices of the competitors were lawful prices. The defense of meeting competition failed on these grounds. The district court did not rule on whether a supplier was meeting *his* competition in giving an allowance to a dealer who also had competition to meet. That was not the case before it.

On appeal the Second Circuit did not reach the substantive issue, dismissing the case on the ground that the plaintiff had failed to prove the amount of its injuries. Nevertheless, Judge Hand, organ of the Court, seemed to take it for granted that the supplier's action was the natural and lawful response to a price raid from a competitor. He said:

"It is not uncommon in the industry for a filling station to start what has come to be known as a 'gas war'; that is to cut the prevailing price of gasoline, which other competing stations must meet by a corresponding cut in order to keep up their sales; and that makes it important for the producing companies to reduce their prices to their own competing stations" (240 F. 2d 457, 458).

The district court was fully aware of the unreality of its approach, as is evident from the court's admission that it is a "fiction to speak of price competition at the oil company sale to the station level"; a filling station operator carrying a brand-name gasoline does not buy from several competing oil companies.[19] Inherent in the court's conclusion, and in the position of the Commission in this case, is the notion that although a supplier's product competes with the products of other suppliers for the motorists' trade a supplier is not in competition at the consumer level—even with a supplier-retailer; or, if he is, the Act ignores it. Thus, if Super Test had attempted to increase its share of the market by offering its gasoline to McLean at a price under Sun's price, the Commission—so it says in regard to such an unusual situation—would have allowed Sun to meet the competition by reducing its

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[19] W. W. Wright, 35 years with Sun, Sales Manager and Vice-President of Sun, testified: "I would say all gasoline is sold to the public through stations operating or handling one brand of gasoline.

"Although the Standard Stations and Richfield cases dealt primarily with exclusive dealing in gasoline, there is in fact little future in the attempt to have stations handle more than one brand. 'Split pump stations,' as they were called, were formerly quite common, but defects of the system caused most of them to disappear. As early as 1931 two surveys showed 85 and 95 per cent of motorists expressing themselves as opposed to it, primarily out of fear that the dealer would substitute the second brand for the desired one. Not only did dealers find that handling one brand required less investment and less bookkeeping, but six out of seven felt that it actually increased sales. As to suppliers, they naturally dislike operating through dealers whose lack of special enthusiasm for their own brand is obvious to the customer.

"In bringing the Standard Stations suit, the Department of Justice probably had in mind elimination of exclusive dealing in motor oil and TBA as much as or more than in gasoline." 1 Whitney 126, op. cit.

prices to McLean. Yet Super Test accomplishes the same purpose by undercutting McLean, and the Commission gives its blessing to the practice. The Commission would have Sun sit and watch Super Test squeeze McLean out of business and take over Sunoco customers at 19th and Pearl. A result so extreme mocks the principle. "The heart of our economic policy long has been faith in the value of competition"; "Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor". *Standard Oil Co.* v. *FTC*, 340 U.S. 231, 248.

To our way of thinking, the court's approach in Enterprise, and the Commission's doctrinaire approach here are inconsistent with the view of gasoline marketing taken in the "Detroit" opinion, *Standard Oil Company* v. *FTC*, 1951, 340 U.S. 231, 71 S. Ct. 240, 95 L. Ed. 239.[20] Standard Oil of Indiana, to meet a competitor's price, sold gasoline to four wholesalers, jobbers, in the Detroit area at a lower price than it charged its retail dealers. The jobbers passed on this saving to their customers who were able to undercut retail dealers buying directly from Standard Oil. The Commission took the position that Section 2(b) merely allowed rebuttal of a prima facie case, and was not a substantive justification of an otherwise unlawful

[20] "The canons of construction applied by the Supreme Court in the 1951 'Detroit' opinion are the direct antithesis of those employed by the District Court in Enterprise." Steed, Antitrust Problems Under Price War Conditions, Southwestern Institute on Antitrust Laws, 77, 100 (1958). (It should be pointed out that Steed is an attorney for the Texas Company).

"The Enterprise view of the good faith defense is in sharp contrast with that expressed by the Supreme Court in *Standard Oil Co.* v. *FTC*." Note, The Good Faith Defense of the Robinson-Patman Act, 66 Yale L.J. 935, 938 (1957).

price discrimination. The Supreme Court held that Section 2(b) good faith defense was absolute even through a substantial lessening of competition might result, and remanded the case to allow Standard "to show that its lower price to each jobber was made in order to retain that jobber as a customer and in good faith to meet an equally low price offered by one or more of its competitors." 340 U.S. 231, 236. The case is distinguishable on the facts, but the Court was acutely aware of the interaction of competition at various levels and recognized the validity of the defense even though the price differential would have an injurious effect on competition among the supplier's dealers and the dealers' purchasers:

> It must have been obvious to Congress that any price reduction to any dealer may always affect competition at that dealer's level as well as at the dealer's resale level, whether or not the reduction to the dealer is discriminatory. Likewise, it must have been obvious to Congress that any price reductions initiated by a seller's competitor would, if not met by the seller, affect competition at the beneficiary's level or among the beneficiary's customers just as much as if those reductions had been met by the seller. 340 U.S. 231, 250.

The "actual core of the defense," the Supreme Court stated, "still consists of the provision that whenever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain that customer, may in good faith meet that lower price." 340 U.S. 231, 242. Here, there is no doubt that Super Test's prices threatened "to deprive" Sun of McLean as a customer. They did in fact deprive Sun of McLean as a customer. And they deprived Sun of sales, through McLean, to the motoring public. "Clearly, a seller's need for a lower price in response to a decrease in his sales is the same

whether the decrease occurs because his purchasers switch to a price cutting competitor or because [his purchasers] are unable to protect their share of the retail market from distributors of a rival product." [21]

In the instant case the Commission shows a proper solicitude for other Sun stations in McLean's sales territory. Sun denied that these stations suffered any substantial loss of business attributable to McLean. The Examiner found that four of these stations suffered a loss of trade, although they were located at distances of somewhat less than a mile to three and a half miles from 19th and Pearl streets and it would seem impossible to say whether they suffered a substantial loss of gallonage from Sun's price allowance to McLean or from Super Test's aggressive price cutting. But if the good faith defense is to have meaning *when applied to a supplier in competition with a supplier-retailer*, it must be recognized that some dealers may suffer a diversion of business when the supplier lowers its price to meet competition. This result is consistent with the theory of the Robinson-Patman Act in the light of national policy as expressed in the Sherman Act. The two statutes must be reconciled—if possible.[22] National policy favors consumers and the competitive process. Consumers favor the benefits of competition—not the benefits of buying from particular mer-

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[21] Note. The Good Faith Defense of the Robinson-Patman Act: A New Restriction Appraised, 66 Yale L. J. 935, 939, (1957). See also Casady & Jones, The Nature of Competition in Gasoline Distribution at the Retail Level, 79–92, 122–38 (1951).

[22] "It is our duty to reconcile such interpretation [of the Robinson-Patman Act], except where Congress has told us not to, with the broader antitrust policies that have been laid down by Congress." *Automatic Canteen Co.* v. *FTC*, 1953, 346 U.S. 61, 74, 73 S. Ct. 1017, 97 L. Ed. 454.

chants. Thus, the Attorney General's National Committee to Study the Antitrust Laws, emphasizes that the Robinson-Patman Act focuses on "the vigor of competition in the market rather than hardship to individual businessmen * * *. Incidental hardships on individual businessmen in the normal course of commercial events can be checked by a price discrimination statute only at serious risk of stifling the competitive process itself."[23] Taking a coldly objective view of this case, one would have to say that, regardless of some injury to certain Sun dealers, Super Test's price-cutting and Sun's response of making an allowance to McLean benefitted consumers and the competitive process in at least two ways: by promoting competition at the retail level and by providing an opportunity for a major to break away from a uniform pricing system[24] characteristic of an oligopolistic[25] industry such as the oil industry.

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[23] Report of Attorney General's National Committee to Study Anti-Trust Laws, 164–165 (1955). See also *Anheuser-Busch* v. *FTC*, 1959, 265 F. 2d 677.

[24] It has been suggested that the "belief that Standard's price discrimination [in the Detroit Case, 340 U.S. 231] thus encouraged competition both on retail and supplier levels may well have been behind the Justice Department's open disagreement with the FTC." Comment, Price Discrimination in Gasoline Marketing, the Detroit Jobbers Case, 19 U. of Chi. L. Rev. 58, 63[4] (1951).

[25] Rostow and Sachs write: "In short, in the case of the oil industry the beginning of analysis from the point of view of the antitrust laws is the proposition that the major companies are *oligopsonists* in the crude purchasing market and *oligopolists* in the sale of refined products." Entry Into the Oil Business, 61 Yale L. J. 856, 893 (1952). "A structurally oligopolistic market is one in which the few largest sellers in the market have a share of the market sufficient to make it likely that they will recognize the interaction of their own behavior and their rivals' response in determining the values of the market variables." Kaysen and Turner, Antitrust Policy, An Economic and Legal Analysis 27 (1959).

For precedent, the Commission relies solely on Enterprise. Sun, aside from the Standard Oil decision, finds aid and comfort in *Balian Ice Cream Co.* v. *Arden Farms*, 9 Cir., 231 F. 2d 356, cert. den. 350 U.S. 991 and *American Cooperative Serum Association* v. *Anchor Serum Co.*, 7 Cir., 1946, 153 F. 2d 907, cert. den. 329 U.S. 721. Balian is distinguishable in that the supplier cut its price on ice cream products to all of its customers in the entire Los Angeles market area, and the Court found that there was no injury to any of the customers.[26] In *American Cooperative Serum Association* v. *Anchor Serum Co.* the Association sold directly to consumers through druggists who acted as warehousemen or

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[26] Balian was a treble damage action under the Robinson-Patman Act in which the plaintiff ice cream manufacturers in Los Angeles contended that they were injured when the defendant Arden Farms, a manufacturer and distributor, lowered its prices on ice cream products in the Los Angeles area only. The Court upheld the defense of meeting competition. A number of the ice cream manufacturing plants were "captive creameries," in that they were owned by large chains and manufactured ice cream only for their owners. Customers supplied by Arden were in competition with retail outlets supplied by the captive creameries. Arden lowered its prices to its customers, retail dealers, to enable them to meet competition at the consumer level. It is clear that the captive creameries did not offer to sell at lower prices to Arden's dealers. Arden, therefore, is in the same position as Sun in the instant case. The district court (104 F. Supp. 796, 802), as well as the Court of Appeals, did not restrict the defense of meeting competition to the single situation where a supplier's retail dealer is offered lower prices by another supplier. The Court said: "The customers of Arden in the respective area are not in competition with each other, and the products sold in each area are sold in competition with like products manufactured by others."

agents; as a retailer the Association could meet the price of its competitors at the retail level."

According to the Commission, even without any judicial gloss Section 2(b) is clear and unambiguous: "the plain wording of the proviso * * * has reference to the good faith meeting of competition of the seller, rather than that of the buyer". Sun agrees that the section is clear and unambiguous: it contains no such restrictive language as the Commission reads into it, and Sun was within the scope of the proviso in reducing its price to McLean "to meet an equally low price of a competitor", Super Test. These conflicting constructions illustrate again that the Robinson-Patman Act is not distinguished for its clarity of expression.[22] Here the language of Section 2(b)

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[21] There is an analogy between the druggists, through whom American Cooperative Serum Association sold, and filling station operators—if one looks through the independent contractor status of gasoline retail dealers. Such dealers are something less than independent merchants and something more than the supplier's employees. They cannot try Sunoco one day and Esso the next; they are inextricably associated with the gasoline they sell. In American Cooperative Serum the Court treated the druggists as "warehousemen" or "agents": they actually received the serum on consignment.

[22] "The Robinson-Patman Act has been called, among other things, 'one of the most tortuous legislative pronouncements ever to go on the statute books'. [Dirlam and Kahn, Fair Competition, The Law and Economics of Anti-Trust Policy, 119 (1954)]. It has been dubbed 'complex and anomalous' [Markham, Report of the Attorney-General's Committee on Anti-Trust Laws, 70 Q. J. Econ. 211], 'prolix and perplexing' [Report of the Attorney General's Committee to Study Anti-Trust Laws, 172 (1955), and 'obscure' [id. at 175].] I am sure it has been called other things which have not been recorded and which could not be repeated here." Boles, Marketing and the Robinson-Patman Act, Southwestern Legal Foundation 1958 Institute on Anti-Trust Laws, 1. See also *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, 65. 73 S. Ct. 1017, 97 L. Ed. 454.

seems imprecise enough to support either interpretation.[20] Turning to the legislative history of the Act for enlightenment, we find Delphic generalities but no evidence that Congress considered the specific question at issue. In the absence of aid from judicial precedents and legislative history, we are driven to determining whether Sun's construction of Section 2(b) is more meaningful and more in harmony with the purposes of the Act than the Commission's construction. This determination requires us to weigh the disparate effects of the two constructions.

For an oil company marketing gasoline through filling stations owned or leased by the operators and competing with a supplier-retailer, the practical effect of adopting the Commission's view is to excise from the Act the defense of meeting competition.

If gasoline could be canned like tomatoes and stocked like bottled goods, and if gasoline suppliers competed with each other for the retail merchant's trade, the Commission's reading of Section 2(b) would be more realistic and more reasonable than is here presented. But the nature of gasoline, the necessity for its bulk merchandising, the responsibility of the refiner or supplier for advertising, the dependent relation of the supplier on its dealers and the dealers on a single supplier make it a "fiction", or something less substantial than a legal fiction, "to speak of price competition at the oil company sale to the station

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[20] Considering the difficulty of defining "competitor," "injury to competition," and "meeting competition in good faith," the Robinson-Patman Act may have the virtue Savigny ascribed to Roman law: "the excellence of a Roman law lay in its being neither too plain nor too obscure, but expressed in a sort of middling obscurity. 'Auf einem schmalen Raume mittelmassigen Dunkelheit.'" Quoted in Curtis, A Better Theory of Legal Interpretation, 3 Vand. L. Rev. 407, 421 (1950).

level".[30] An oil company's product competes with the products of other refiners or suppliers in the motorists' market—through dealer outlets.[31] And, no oil company can stay alive if it loses its dealers.

The gas station retailer is a rare bird among retail merchants. His business is built around pumps which can be used only for his supplier's gasoline.[32] Sun sells Sunoco in pumps that say "Sunoco". Its competitor at 19th and Pearl in Jacksonville, Super Test, sells its gas in pumps that say "Super Test". Sunoco gasoline flows unchanged from Sun through Sun pumps to motorists. Sun, not some small retailer, bears the primary responsibility of advertising and for puffing Sunoco against Super Test and other gasolines even though the sales which are competitive take place at the consumer level. McLean's losing fight for survival, therefore, was a lost battle in a long war between Sunoco and Super Test gasoline and be-

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[30] *Enterprise Industries, Inc.* v. *The Texas Co.*, 136 F. Supp. 420, 421.

[31] "Most of the evidence seems clearly to demonstrate that a company offers discounts because its dealers are losing business to price-cutting competitors; since the major suppliers compete among themselves and with independents primarily *through* their dealers, the concessions are made in a very real sense in good faith to meet competition. Furthermore, there is little evidence—and certainly none so far in these cases [Enterprise and the instant case, then before the Commission]—that the discriminations complained of put a halt to price competition, or even threatened to do so. On the contrary, dual distribution and discriminatory price concessions seem to have contributed on balance to the intensity of price competition, where their effects have been visible." Integration and Competition in the Petroleum Industry, DeChazeau and Kahn, 480, (1959).

[32] This practice does not violate Section 3 of the Clayton Act. *FTC* v. *Sinclair Refining Co.*, 1923, 261 U.S. 463, 43 S. Ct. 450, 67 L. Ed. 746.

tween Sun and Super Test, suppliers, each out to increase its share of the motorists' trade.

As Mr. Justice Jackson has pointed out: "Retailers' storage capacity usually is limited and they are in no position to accumulate large stocks. They can take gas only when and as they can sell it".[33] The suppliers therefore, must maintain gasoline stocks to meet the needs of the ultimate consumer—the motorist; and a service station, therefore, primarily is what the word indicates—a *service* station. In gasoline marketing the supplier simply cannot be cut off from the filling station operator and treated as if it competed only for the business of filling stations; oil companies compete with each other for the consumer's business.[34]

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[33] Dissenting opinion, *Standard Oil Co. v. U.S.*, 337 U.S. 293, 323.

[34] "The legislative history of the Robinson-Patman Act discloses that one of the major dissatisfactions with original Section 2 of the Clayton Act was the belief that it was confined to cases where the effect of a price discrimination was on competition among sellers. The Robinson-Patman Act modified a number of provisions of old Section 2, including both the competitive effect and meeting competition clauses. The modified provisions are distributed between the newly created subsections (a) and (b).

There is no reason to suppose that when the prohibition was amended to include discriminations having adverse effects upon buyers, the failure to express a corresponding change in the meeting competition defense was anything more than the type of inadvertence which is the hallmark of the statute. For it is clear that the defense was intended to be correlative with the offense. Nor has any reason of policy been suggested for creating an imbalance between the prohibition and the justification. If the occasion for meeting competition exists, the validity of the defense should not depend on the hierarchy in the scheme of distribution at which competition is met. A multi-tiered condemnation requires a multi-tiered defense." Steed, Antitrust Problems Under Price War Conditions, Southwestern Institute on Antitrust Laws, 77, 99 (1958). Wright, Vice-President and Sales Manager for Sun testified: "In this

The filling station operator is a conduit between the supplier and the motoring public. As Mr. Justice Jackson observed:

> But the retailer in this industry is only a conduit from the oil fields to the driver's tank, a means by which the oil companies compete to get the business of the ultimate consumer—the man in whose automobile the gas is used. * * * The retail stations, whether independent or company-owned, are the instrumentalities through which competition for this ultimate market is waged.

The Commission centers its argument on the contention that Sun reduced its price to McLean "to favor a particular customer in order to help that favored customer meet his competition." It is true that McLean was in a direct competition with the Super Test station across the street. It is true that he was in distress. But there is nothing in the record to show that any Sun official beat his breast over the personal plight of *Gilbert* v. *McLean*. On the contrary, the record shows that Sun reduced its price to McLean—to help itself; to meet low prices that were inducing motorists to buy Super Test instead of

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setup the dealer actually is a conduit between the supplier, enjoying the patronage of the motorist, and the motorist and in essence they become, the dealer and the supplier become, a team of which the supplier and not the dealer assumes the major responsibility for promoting and guiding competition within the area * * *. Now, it is not the service station operator, due to the limited facilities available, who is able to supply the repeated demand for gasoline, but it is the supplier who assumes that responsibility. Service stations are just too small to permit more than a few days' supply of gasoline * * *. We were competing with the station as a retailer of Super-Test gasoline for the business of the motorists residing or working near that location, 19th and Pearl, and who would find it convenient to stop at that station."

Sunoco gasoline. Keeping McLean in business at 19th and Pearl was keeping Sun in business at 19th and Pearl and preserving Sun's share of the market in the Jacksonville area.

An unfortunate result of narrowing the scope of Section 2(b) is that it takes flexibility out of a defense that ought to be flexible and dependent on individual competitive situations. Here the Commission gives no consideration to the fact that Super Test was a supplier-retailer. The Commission's sole criterion is whether Sun's price to McLean is lower than Sun's price to other dealers. The result is doubly unfortunate when the price-cutting supplier is a vertically-integrated company. The natural effect of the Commission's holding will be to push already highly-integrated majors into combining direct retailing with their other operations—*to the detriment of non-majors, such as Super Test, as well as to the detriment of filling station operators.*

One of the purposes of the Robinson-Patman Act was to promote local ownership, protect the small, independent merchant, and reduce the trend toward monopoly.[35] Congressman Patman stated that the bill

[35] The Clayton Act was primarily intended to prevent predatory practices of large sellers whose selective price-cutting, often below cost, enabled them to kill off smaller competitors. The Robinson-Patman Act was in good part the outgrowth of the FTC's investigation of chain stores. The primary purpose of the Act was to prohibit quantity discounts by large sellers where there was no cost saving attributable to the quantity sales. FTC, Final Report on the Chain Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess. (1935); S. Rep. No. 1502, 74th Cong., 2nd Sess. 4 (1946). See Austin, Price Discrimination and Related Problems under the Robinson-Patman Act 5–11, 93–96 (Amer. L. Inst. 1959); Rowe, Evolution of the Robinson-Patman Act, 57 Col. L. Rev. 1059, 1061 (1957); Palamountain, The Politics of Distribution chap. VII (1955); Rowe, Price Discrimination, Competition and

was "designed to accomplish what so far the Clayton Act has only weakly attempted, namely, to protect the independent merchant, the public whom he serves and the manufacturer from whom he buys, from exploitation by his chain competitor." 79 Cong. Rec. 9078. "The primary remedial objective of the Robinson-Patman amendment of the Clayton Act, therefore, was the protection of the smaller independent merchants from injury to their competitive position resulting from discriminatory advantages extended by manufacturers and producers to mass distributors who were using their concentrated buying power to demand and obtain price concessions and preferential allowances and services. Whereas Section 2 of the original Clayton Act was aimed at predatory practices of powerful sellers directed at elimination of *their* weaker competitors, the Robinson-Patman Act was designed to curb the predatory use of bargaining power by chain stores and other large buyers and to preserve the independence of the small merchant as a factor in his local community." Austin, Price Discrimination Under the Robinson-Patman Act, p. 11 (American Law Institute, 1959). Here, ironically, the Federal Trade Commission, swept on inexorably by the logical necessities of its barren logic, finds itself in the unnatural role of fostering vertical inte-

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Confusion: Another look at Robinson-Patman Act, 60 Yale L. J. 923 (1951); Fielda, Food Distribution in the United States, 99 U. of Pa. L. Rev. 1051 (1951); Machlup, Characteristics and Types of Price Discrimination 397, 412 (1955); Dirlam & Kahn, Fair Competition 206 (1954). Authorities on the origin and legal impact of the Act are collected in footnotes 5 and 6 of Rowe, Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act, 664 Yale L. J. 1, 2 (1959).

gration at the expense of the small, independent filling station retailer.[36]

The Commission's construction gives the vertically-integrated company a competitive advantage based on the legal effect the Commission attaches to integration of retailing operations rather than on such economic factors as efficiency of merchandising, of distribution or of performance. This is not the case of an aggressive retailer, such as a supermarket, having an established policy of doing a high volume business on a low margin, consistently emphasizing price over service. As the Commission sees it, without regard to the economics of merchandising gasoline, a supplier-retailer, large or small, may with impunity undercut the retail outlet of a competing supplier. The undercut supplier may not resort to defensive tactics such as price allowance to his established outlet that in part (here, 1.7 cents) protects his dealer and himself against sporadic predatory raids.

How may a supplier protect itself in such a case? First, as the Examiner, perhaps with tongue in cheek, suggested, Sun could change its system of distribution, integrate its retail outlets, and sell directly to motor-

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[36] "Moreover, by narrowing the scope of section 2 (b), the decision aggravates the effect of price wars on retailers who are forced to cut their prices to maintain their volume of sales. * * * [Such a decision's] sole effect is to prohibit suppliers from lowering their wholesale prices to help their retailers meet a competitor's price cut. While this may prevent retail prices from being driven as low as might otherwise occur, the full amount of these price cuts must now come out of the dealer's profit margin. And since the ability of the retail dealer to meet price cuts normally acts as a deterrent to aggressive price-cutting * * * [such a decision] may even tend to encourage such practices." Note, The Good Faith Defense of the Robinson-Patman Act: A New Restriction Appraised, 66 Yale L. J. 935, 941-942.

ists through stations the company owns and operates.[37] Second, as of course the Examiner did not suggest but implicit in the suggestion, is the alternative that Sun withhold help to a filling station in distress and put the entire burden on the individual dealer—an intolerable burden, for, as this case demonstrates, an individual retailer cannot survive a price war with a company that has integrated wholesale marketing and retailing. The retail dealer operating his own filling station works on such a thin margin that the slightest cut slices to the bone, and his resources are not large enough to enable him to hold out for the duration of any long drawn out price war. A large margin makes him an easy prey to an aggressive competitor. The effect of the Commission's holding, therefore, is to bury the small, independent filling station retailer—whether the supplier takes over the ownership and operation of all its stations or, putting the entire burden on the dealer, the supplier takes no action. This dilemma and its implications could not and did not escape the attention of the Examiner or the Commission. The Examiner made—and the Commission approved—the suggestion, one that is somewhat more than banal, that if Sun should choose not to meet competition from Super Test by operating its own stations, a course of action naturally repugnant to the

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[37] The examiner's opinion, adopted by the Commission, states:

"It is true, of course, as respondent argues, that where one or some of its dealers are faced with ruinous price competition respondent must take some action or suffer the loss of such dealership and respondent's competition with its own competition, but of course this is not the law and cannot justify price discriminations injuring others. Respondent could, if it chose to, meet such competition at the dealer level by nondiscriminatory reductions in price to all dealers, or by operating its own stations and thus being in direct competition with other stations which reduce prices."

Commission, Sun could meet "competition at the dealer level by non-discriminatory reductions in price to all dealers". In other words, to avoid the dilemma and to meet competition on the corner of 19th and Pearl streets in Jacksonville, Sun, perhaps ruinously, would have to reduce its price to all of its dealers in the United States.[38] Or, assuming that the suggestion means "all dealers" in Jacksonville—in context it is not so limited—and assuming also that such price reduction would not run afoul of Anheuser-Busch,[39] the Commission would have Sun enlarge the scale of the price war and risk a chain-reaction that might set off price wars throughout Florida and Southeast United States. In either case, other oil companies, majors and non-majors, would have to meet Sun's price-cuts thereby spreading price wars and subjecting the margins of filling station operators to further compression.

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[38] The Supreme Court has said that the Robinson-Patman Act does not require a seller to choose "between ruinously cutting its price to all customers * * * or refusing to meet the competition and then ruinously raising its prices to its remaining customers to cover increased unit costs." *Standard Oil Co.* v. *FTC*, 340 U.S. 231, 250 (1951).

"The characteristic unwillingness of large national sellers to experiment with price changes will certainly be intensified if any reduction must be made in all submarkets, and oligopolistic industries will therefore be deprived of an important source of price flexibility." Comment, Competitive Injury Under the Robinson-Patman Act, 74 Harv. L. Rev. 1597, 1603 (1961). See also Dean, Managerial Economics 458 (1951); Machlup, The Economics of Sellers Competition 465 (1952).

[39] As noted in the Comment, Competitive Injury Under the Robinson-Patman Act, 74 Harv. L. Rev. 1597, 1599, "The cease and desist order [in Anheuser-Busch] prohibiting reductions unless proportionately made in all markets, did not disturb the preexisting patterns of geographic variation that had been characteristic of the company's price behavior."

Sun's restraint in taking no defensive action for four months and in giving a discount only to McLean had at least the merit of attempting to localize a disruptive price battle. Extension of similar discounts by other major suppliers and by Sun, on an area basis, promptly resulted in a price war in the area.[40] But suppose that a supplier in Sun's situation should decide that an across-the-board tank-wagon price reduction to meet competition at one location is irrational, bad business management, and more than likely to bring on a general price war. Then, if the Act must be construed as forbidding a supplier's making a price allowance to a retail outlet in distress—the effect is to freeze the price level of major brands of gasoline and to promote rigid resale price maintenance.[41]

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[40] The record shows that in March 1956 virtually all of the stations in Duval County sold gasoline at reduced prices. The gallonage for the county increased 28.5 percent over the gallonage for January.

For a case study of a price war in Philadelphia that arose from a competitive situation similar to the situation in the present case and also involved Sun, see Note, Competition in Gasoline Retailing: A Price War, 101 U. of Pa. L. Rev. 647 (1953).

[41] A practice of tailoring tank-wagon prices to meet individual competitive situations tends to reduce the effectiveness of the resale-price-maintenance characteristics, such as they are, of a major's pricing policy. The Commission's holding has the opposite effect since it tends to make for uniformity and rigidity in resale prices. Cf. Adelman's thesis: "The Act inhibits competition in the name of protecting competition." Adelman, The Consistency of the Robinson-Patman Act, 6 Stanford L. Rev. 3 (1953). See also Edwards, Maintaining Competition 159–71 (1949); Resale Price Maintenance and the Anti-Trust Laws, 18 U. of Chi. L. Rev. 369 (1951); The Swinging Door—Or How to Obey One Anti-trust Law by Violating Another, 59 Yale L. J. 158 (1949); The Good Faith Defense of the Robinson-Patman Act: A New Restriction Appraised, 66 Yale L. J. 935, 944 (1957).

Imprecise language in the Robinson-Patman Act, policy divergencies between that Act and the Sherman Act, and the interrelation of integration and competition in the petroleum industry make it difficult for the Commission and the reviewing court to apply Section 2(b) with certitude as to the correctness of its application to the issue for decision. The Commission itself has changed sides on the issue.[42] We have reached the conclusion that in this case the Commission's construction of Section 2(b): violates the policy of the Act that places emphasis on individual competitive situations; focuses on injury to particular competitors rather than on the health of the competitive process; conflicts with the purpose of the Act to protect the small retailer; fosters vertical integration of retailing operations, jeopardizing the future of the non-major as well as the independent filling station operator; discourages sound marketing in that it confers a competitive advantage on a supplier gaining trade by sporadic predatory low prices unrelated to economic factors, in the sense that a high-volume low-margin policy of a super-market is related to such economic factors as low-cost efficiency of operation and the maximization of over-all profit; denies the realities of the market place in refusing

[42] The position taken by the Commission in this case represents a shift in its views. Before 1956 the Commission held that price allowances such as Sun made to McLean enjoy the protection of the defense of meeting competition. See testimony of Gwynne, Chairman, FTC, before Senate Committee on the Judiciary, Subcommittee on Antitrust and Monopoly, "To Amend Section 2 of the Clayton Act" Hearings, 84th Cong., 2d Sess. (1956), p. 229–232; cf. ibid., p. 89–92. In 1956 the Senate Sub-Committee on Retailing, Distribution and Fair Trade endorsed views similar to those now held by the Commission. S. Rep. No. 2810, 84th Cong., 2d Sess. 20, 28–29 (1956).

to accept the undeniable fact that a supplier of gasoline competes with a supplier-retailer at the consumer level through filling station operators; tends to spread rather than localize price wars; and makes it impossible, as a practical matter, for a supplier to defend one of its filling stations, fighting for survival, or even to defend itself against destructive price raids of a supplier-retailer. Section 2(b) should not be read so narrowly as to produce effects so out of line with national policy. These effects may be avoided, in keeping with the spirit of the law and within the letter of the law, by a broad and simple construction: under Section 2(b) a supplier may be in competition with a supplier-retailer. Here, a supplier selling gasoline that is in competition with the gasoline of a supplier-retailer and marketing its gasoline through an independent filling station that is in direct competition with a filling station owned and operated by the supplier-retailer is in competition with that supplier-retailer and entitled to assert the defense of meeting competition in good faith.

II

The examiner held that even if Sun could assert the Section 2(b) defense, Sun failed to satisfy the statutory requirements of the defense for two reasons. First, Sun's allowance to McLean was not to meet competition, but to undercut Super Test's price.[13] Second, Sun and McLean entered into an

[13] One of the anomalies created by the Robinson-Patman Act is the doctrine that the primary test of good faith is whether the seller's lower price was made for the purpose of beating competition: that in competing for business a seller may equal a competitor's price but not go below it. *Moss, Inc.* v. *FTC*, 2 Cir., 1945, 148 F. 2d 378; *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 2 Cir., 1929, 30 F. 2d 234.

agreement to fix the resale price of Sunoco gasoline. Such price-fixing agreement destroys the good-faith defense and violates Section 5 of the Federal Trade Commission Act.

A. The examiner's holding that Sun's allowance to McLean was to beat competition rests on the fact that the allowance of 1.7 cents was to enable McLean to post a price of 25.9 cents a gallon for Sunoco, a price then only one cent above the price of Super Test. This holding is a complete reversal of the views the examiner expressed during the hearing." The Commission did not discuss the point in its opinion; it did, however, adopt the findings and conclusions of the examiner.

The examiner was right the first time. (1) There is evidence in the record supporting the contention that the usual price differential between a major's regular gasoline and a non-major's regular gasoline is two cents. The examiner found, however, and the record supports the finding, that: "There is also considerable evidence in the record that the price differential between the two is frequently one cent a gallon. Suf-

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"Near the end of the hearing, the examiner commented: "[The Commission said] nothing in the complaint about fixing a price or cutting the price to within one cent of the competition * * *. If you had an allegation that by fixing a price, by cutting the price or maintaining the price within one cent of the Super-Test price in order to drive Super-Test out of business or harm competition or unduly suppress competition, as you have in the *Pure Oil* case, then it would be entirely relevant to prove that, and it would first be necessary as a basis for that to prove that one cent would have had the effect, as you are attempting to do in the *Pure Oil* case. * * * On the [Commission's] theory anyone who cuts a price to compete is violating the law and we would have uniformity of price throughout the country, which is exactly what we do not want. * * * I do not think the one-cent differential has anything to do with the case."

fice it to say that there is not sufficient reliable probative, and substantial evidence in the record to establish what, if any specific amount, is the usual and customary difference between major and non-major regular brands of gasoline." This of course bears importantly on the question of Sun's good faith in meeting, not undercutting, Super Test. (2) In holding that Sun's allowance of 1.7 cents to permit a posted price of 25.9 cents was to beat competition, the examiner relied on McLean's testimony that he was not hurt competitively by a two cents spread. But this conclusion assumes that Super Test had an established, relatively stable pricing charge of 24.9 cents. The record shows, however, that Super Test had a bouncing ball pricing policy. The price had dropped as low as 21.9 and 20.9 cents a gallon. October and November prices were fairly stable but from December 1 on, it was beyond human knowledge to say what Super Test's price might be at any particular time and how long the price would stay put." In response to a question from the examiner as to how he arrived at 25.9 cents, McLean testified that he thought it was "to keep the two cents differential". Shortly after December 27, when McLean cut his price, Super Test cut its price to 23.9 cents. Notwithstanding the unpredictable ups and downs in Super Test's prices in December, January, and February, McLean made no attempt to maintain a one cent differential or to ask Sun for any further allowance. February 16 Super Test cut its price to 22.9 cents.

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[2] On December 1, 1955 Super Test regular gasoline was priced at 26.9 cents a gallon. December 4 it dropped to 21.9. December 5 it went back to 26.9. December 12 it was down again to 21.9. December 13 the price started at 26.9 then dropped to 21.9. December 17 it was again 26.9. December 27 it was 24.9. January 3, 1956, it dropped to 23.9. February 16 it went to 22.9 and February 28 to 19.9.

Two days later McLean went out of business. We point out, too, that in view of Super Test's practice of giving savings stamps, worth about one cent a gallon, the actual spread exceeded the apparent differential. It seems to us that in view of this nervous and erratic pattern of irregular prices, Sun's allowance of not quite two cents and McLean's choice of 25.9 cents were about as fair and reasonable a meeting of competition as anyone could expect. (3) In reaching this conclusion, we have also considered, as evidence of good faith, Sun's restraint over a long period of provocation and Sun's diligence in attempting to collect and evaluate the facts before taking any defensive action.

B. The examiner concluded, again reversing the view he held during the hearings,* that Sun and McLean entered in a price-fixing agreement or understanding. Price-fixing is per se unlawful. *United States* v. *Socony Vacuum Oil Co.*, 1940, 310 U.S. 150, 223. We recognize that direct proof of such agreement is not necessary, and that the Commission is charged with fact-finding. But the difficulty of proving an "understanding" and the acceptability of circumstantial evidence as proof do not justify relaxing the requirement that substantial evidence must support the Commission's findings and conclusions. As we read the record as a whole, there is no substantial evidence to support the Commission's finding of a price-fixing agreement. McLean, testifying a year

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* The examiner stated that the argument of the Commission did not "make sense." He said: "[Y]ou then jump to the conclusion that they must have agreed to fix the price because the price was a one-cent differential but that might just as well have been a unilateral decision on the part of McLean or a unilateral decision on the part of Sun, if they controlled the price, as you claim. That would not be any evidence of an agreement between Sun Oil and McLean."

after he had been forced out of business, apparently not actuated by any love for Sun, unequivocally stated that he had no agreement or understanding with Sun as to his retail price."[17] Sun's regional manager and sales manager, who handled the allowance to McLean, were subjected to rigorous cross-examination. They testified that Sun does not fix the retail price for its dealers, and did not have an agreement or understanding with McLean as to his resale prices. He could post any price, and 25.9 was the price he selected. Two of the four Sun dealers allegedly injured did testify that McLean told them that he was "very dis-

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[17] McLean testified:

"Q. What kind of an understanding did you have with Sun Oil Company leading up to them giving you this price adjustment?

"A. Well, I think I had been after them to get that price adjustment and on that day—I was closed for one or two days—and that day the salesman came around, Mr. Harper, and he said—I was talking to him about it and he said if it continued, if they dropped again, Super Test dropped again, that they would try to do something about it.

"He stayed around, I guess, 30 minutes or an hour and then he went off and on that day they did drop their prices and they gave me an adjustment and I dropped mine.

"Q. Now, is that all—what were you required to do if anything to get the adjustment?

"A. To take a cut."

* * * * *

"Q. I will ask you this, then: Weren't you required to do something to obtain that?

"A. To obtain that price?

"Hearing Examiner Piper: Yes.

"A. No, I dropped my gas but I wasn't required—I didn't have no agreement with them as far as lowering my price or raising my price or anything. There was no agreement made.

"Q. Was there anything said to you about reducing your margin of profit?

"A. Yes my margin of profit was reduced."

satisfied with the arrangement", but they refused to state that he had told them that he had an agreement with Sun or that Sun required him to fix a price of 25.9 cents.

The inference of price-fixing is based, as the examiner phrased it, on McLean's "testimony that he was required to take a cut in prices ['and drop his retail price to 25.9'] * * * in order to secure the discount of 1.7 cents per gallon from [petitioner]." The record shows, however, that the arithmetic of the situation, not Sun, required a discount of 1.7 cents and compelled McLean to take a cut of 1.3 cents, if he wished to post a price of 25.9 cents and still keep a bare subsistence margin of 3.5 cents above the tank-wagon price. That is what McLean was trying to say when he talked about being "required" to take a cut and having his margin of profit "reduced." He had no difficulty in making it clear that there was no agreement, no *quid pro quo,* and he saw no inconsistency in his testimony. When Sun finally lowered its tank-wagon price to McLean, it is fair to assume that Sun would not have done so, if McLean had intended maintaining his price of 28.9 cents a gallon. Such an arrangement would have given him a margin of 6.5 cents, clearly an unjustifiable preference over other Sun dealers.

This is a long way from a price-fixing agreement.

For the foregoing reasons, we set aside the Federal Trade Commission's cease and desist order issued against Sun Oil Company January 5, 1959.

APPENDIX B

United States Court of Appeals for the Fifth Circuit

OCTOBER TERM, 1959

No. 17,658

SUN OIL COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL TRADE COMMISSION

Before JONES, BROWN and WISDOM, *Circuit Judges*

Judgment

This cause came on to be heard on the petition of Sun Oil Company for review of an order of the Federal Trade Commission issued on January 5, 1959 in Docket No. 6641, and was argued by counsel;

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the order of the Commission in this cause be, and the same is hereby, set aside.

July 24, 1961.

Issued: September 13, 1961.

A true copy:

Test:

EDWARD W. WADSWORTH,
Clerk,
U.S. Court of Appeals, Fifth Circuit.
By CLARA R. JAMES,
Deputy.

NEW ORLEANS, LOUISIANA, *September 13, 1961.*

APPENDIX C

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners: JOHN W. GWYNNE, *Chairman*, ROBERT T. SECREST, SIGURD ANDERSON, WILLIAM C. KERN, and EDWARD T. TAIT.

Docket No. 6641

IN THE MATTER OF SUN OIL COMPANY, A CORPORATION.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of the respondent from the initial decision of the hearing examiner and upon the briefs filed in support of and in opposition to the appeal and oral argument of counsel; and

The Commission having rendered its decision denying the appeal and adopting the findings, conclusions and order contained in the initial decision:

It is ordered, That respondent Sun Oil Company shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist contained in the aforesaid initial decision.

By the Commission.

[SEAL] ROBERT M. PARRISH,
Secretary.

Issued: January 5, 1959.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners: JOHN W. GWYNNE, *Chairman*, ROBERT T. SECREST, SIGURD ANDERSON, WILLIAM C. KERN, AND EDWARD T. TAIT.

Docket No. 6641

In the Matter of SUN OIL COMPANY, A Corporation

OPINION OF THE COMMISSION

By GWYNNE, Chairman:

In Count I, complaint charges respondent with a violation of Section 2(a) of the amended Clayton Act in the sale of gasoline to one customer at prices substantially lower than prices charged competing customers, with resulting injury. In Count II, respondent is charged with a violation of Section 5 of the Federal Trade Commission Act by conspiring with such favored customer to fix and maintain the retail price at which such customer sold gasoline at his filling station. The hearing examiner found against respondent on both counts and entered his order accordingly. Respondent has appealed.

COUNT I

Respondent is engaged, among other things, in the sale and delivery by tank wagon of gasoline to independent filling station operators. The alleged favored customer and coconspirator, Gilbert B. McLean, during 1955 and part of 1956, operated a filling station under contract with respondent at the intersection of 19th and Pearl Streets, Jacksonville, Florida. In June, 1955, the Super-Test Oil Company, selling a non-major or private brand of gasoline (as distinguished from the gasoline sold by McLean under

the brand of a major supplier), opened a new service station across the street from that operated by McLean. From its opening until December, 1955, the price usually posted by Super-Test for its regular gasoline was 26.9¢ per gallon, although on occasion, its price was lower and even as low as 21.9¢ per gallon.

The competition of this new station in selling its gasoline at substantially reduced prices caused injury to McLean who was selling at 28.9¢ per gallon, and he appealed to respondent for help. On December 27, 1955, Super-Test dropped its price to 24.9¢ per gallon. Respondent then agreed to give McLean a discount of 1.7¢ per gallon on tank wagon price and McLean dropped his price to 25.9¢. Respondent did not give a similar allowance to any other retail dealer in the Jacksonville area. This difference in price continued until February 16, 1956, when a major price war involving various other companies broke out in Jacksonville and all dealers of respondent were given a price which was the same for all.

Respondent first challenges the sufficiency of the evidence to support the findings of the hearing examiner as to Count I in the following particulars:

1. That the respondent discriminated in price between customers who were competitors within the meaning of the statute.

2. That the difference in price was of such a character as to create a probability of substantially lessening competition.

Considerable evidence was introduced on these propositions. It is reviewed at some length in the initial decision and will not be repeated here. Generally, it consists of:

1. Figures showing increase or decrease in the gallonage of certain affected stations.

2. Evidence as to the loss of specific customers.

3. Geographic details as to location of stations and streets and highways and other facts which might influence buying habits of customers.

On the subject of gallonage, the hearing examiner found that McLean's sales of gasoline were as follows:

	Gallons per month
August, September and October, 1955	6,500
November, 1955	5,900
December, 1955	8,300
January, 1956	32,100

Daily sales until February, 1956, when McLean quit business, averaged approximately the same as January.

The sales of Calvin Peery, who sold respondent's gasoline at 28.9¢, and whose station was less than a mile from McLean's, were as follows:

	Gallons per month
December, 1955	10,900
(which was approximately his monthly average for the last six months of 1955)	
January, 1956	9,300

Jesse McClung, also selling respondent's gasoline at 28.9¢ and whose station was about a mile distant from McLean's also, according to the hearing examiner, sold a substantially lesser amount of gasoline on an average basis for the first two weeks of January, 1956 than he did in the previous month.

William Crabtree's Sun Station, about 2½ miles from McLean's sold about 17,000 to 18,000 gallons per month during the last four months of 1955 and 14,500 in January, 1956.

Clair Winning, operating a Sun station about 3½ miles from McLean's, did not lose gallonage in January. After February 16, 1956, when he received the general price reduction previously referred to, his gallonage increased from 410 gallons on one day to 903.

As against these figures, respondent introduced figures from the Florida Tax reports indicating a decrease in total gasoline sales in Duval County (roughly the same as Jacksonville) from December, 1955, to January, 1956, of 6.8%. Respondent's appeal also calls attention to other evidence. For example, McClung's faulty records (for which the hearing examiner made due allowance in evaluating his testimony); the fact that Peery did not keep his station open on Sundays in January, 1956 (a fact also true of December, 1955); Crabtree's working at the Post Office (although his station was operating as usual).

These circumstances have all been considered but we believe they do not explain the changes in gallonage figures as previously pointed out.

Secondly, all the station operators above named were called as witnesses and gave instances of loss of specific customers. For example, Crabtree saw some of his former customers buying gas at McLean's station and heard from them that it was because of the cheaper price. Winning identified four customers by name and address who abandoned him because of the cheaper price at McLean's. Furthermore, some of these station operators testified that they complained to respondent that they were losing business because of this discriminatory pricing and asked for a reduction in price similar to that given McLean.

The situation disclosed by the record is similar to that considered by the Commission and the courts on several occasions. See, for example, *Federal Trade Commission* v. *Morton Salt Company* (1948) 334 U.S. 37; *In the Matter of Sorensen Manufacturing Company* (1956), Docket No. 6552.

Here, we have a number of small independent retailers selling an identical product at the same price and under substantially the same conditions. All were operating at a small margin of profit and in an

area which was a reservoir of potential customers who, because of the geographic situation, had easy access to that dealer who offered an advantage in price or in services rendered. When such a situation is shown to exist, together with proof that one competitor received a discount from a common supplier, an inference of injury to the others may reasonably be drawn from that fact. Even where other evidence showing injury is presented, this inference may be considered in addition to other proof. The question involved has to do with the inference which may properly be drawn from admitted or proven facts and not with the burden of proof. Although *Samuel H. Moss, Inc.* v. *Federal Trade Commission* (1945), 148 F. 2d 378, is often cited to the contrary, the weight of authority is to the effect that counsel supporting the complaint has the burden of proof to establish the necessary injury. See *In the Matter of General Foods Corporation* (1954), 50 Federal Trade Commission Decisions 885.

In spite of certain statements made in the initial decision, the hearing examiner stated: "As found above with respect to Peery and McClung and as will be found hereinafter with respect to Crabtree and Winning, the record establishes injury to them by respondent's discrimination."

We agree with this finding.

The respondent next argues that the hearing examiner erred in failing to find that the respondent had established in fact and as a matter of law the defense of good faith meeting of competition within the proviso of Section 2(b) of the amended Clayton Act, which provides:

> *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in

good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

The discount given by respondent to McLean was not made to meet a lower price made to the latter by another supplier. It was given to enable McLean to meet the competition of the Super-Test station across the street. Respondent would justify broadening the proviso of Section 2(b) to cover this situation on the theory that respondent and its dealer McLean were, in fact, competing as a unit with other channels of competition.

As pointed out by the hearing examiner, this argument goes beyond the plain wording of the proviso which has reference to the good faith meeting of competition of the seller, rather than that of the buyer. This construction of the proviso was upheld in *Enterprise Industries, Inc.* v. *The Texas Company* (1955), 136 Fed. Supp. 420 (reversed on another ground).

COUNT II

Prior to December 27, 1955, when Super-Test cut its price, McLean did not make any reduction. However, on several occasions, he talked to representatives of respondent and was advised they could do nothing about it. It does appear, however, that its officials were giving consideration to the matter. On December 27, 1955, Super-Test dropped its price to 24.9¢. On that same day, Harry Harper, a salesman for respondent, called at the McLean station and advised McLean that he would get a reduction of 1.7¢ per gallon.

Direct evidence as to what was said on this occasion is found in the testimony of McLean. There is some conflict in this testimony. The hearing examiner concluded that Harper advised McLean "that he would be given a price adjustment of 1.7¢ per gallon if he

would absorb 1.3¢ himself and drop his retail price to 25.9¢."

The hearing examiner had the opportunity to observe the witnesses as they testified. His conclusions as to the weight to be given their various statements should be given proper consideration by the Commission. *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U.S. 474; *Folds* v. *Federal Trade Commission* (1951) 187 F. 2d 658.

There are other facts in the record that support the hearing examiner's conclusion. For example, it appears that in order to compete with Super-Test, McLean needed only a 2¢ margin which, of course, would have given him a larger margin of profit. Crabtree and McClung both testified that McLean indicated dissatisfaction with the arrangement with respondent and that McLean told them that he was selling a lot of gas, doing a lot of work, but not making much profit. On or about February 18, 1956, McLean went out of business.

These facts lend support to the view that in posting his price, McLean was complying with an agreement, rather than acting as a free agent.

Secondly, Harry Harper was not called as a witness nor was any reason given for failure to do so. That this is a circumstance to be considered is well settled. *Runkle* v. *Burnham* (1894) 153 U.S. 216; *Local 167 International Brotherhood of Teamsters* v. *United States* (1934) 291 U.S. 293.

Robert H. Gravette, Jr., an examiner for the Federal Trade Commission, testified as to a conversation he had with McLean in which the latter told of a telephone conversation on December 27, 1955, with someone representing respondent, who said: "If you lower the price of gasoline in your station by 3¢, we will give you a promotional allowance of 1.7¢ per gallon;

that McLean reported he agreed and reduced his price accordingly.

It is not disputed that respondent knew of McLean's competitive problem and did give him a 1.7c reduction and that McLean thereafter reduced his price. The question to be determined is whether that reduction (either expressly or by implication) was conditioned on the posting of a certain price by McLean.

It is well known that conspiracies are often not capable of proof by direct testimony and may be inferred from the things actually done and from the circumstances. *Bausch Machine Tool Company* v. *Aluminum Company* (1934) 72 F. 2d 236, 15 C.J.S. 1043, et seq.

The situation here is somewhat similar to that in *Eastern States Lumber Association* v. *United States* (1914) 234 U.S. 600, involving a conspiracy to violate the Sherman Act. There it was shown that members of a retail lumber dealers association collected information about wholesalers who also sold direct to consumers,—a practice in disfavor with retail dealers. The names of such wholesalers were made available to all members of the Association. There was no direct proof of any agreement among retailers to refrain from dealing with these wholesalers. The court held that, nevertheless, such agreement would be inferred. There is direct testimony as to the agreement. The conclusion that it amounted to a price fixing agreement is substantially supported by the circumstances as shown in the record.

Respondent also contends that even if an agreement were made as to price, it was, nevertheless, legal under the McGuire Act which permits agreements between a seller and a buyer prescribing minimum or stipulated resale prices under certain conditions, when such agreements are lawful under any statute, law or pol-

icy in effect in the jurisdiction in which such resale is to be made.

In *Liquor Store* v. *Continental Distilling Corporation* (Fla. 1949), 40 So. 2d 37, the Supreme Court of Florida declined to enforce the resale agreement on the ground that it was arbitrary and unreasonable and contrary to the public policy announced by the Florida Constitution and statutes. In *Miles Laboratories, Inc.* v. *Eckerd* (1954), 73 So. 2d 680, after the adoption of the McGuire Act, the Court arrived at the same conclusion. Although both of these cases had to do with "non-signers", the decisions were not put on that ground. (For comment on these decisions, see note in 19 ALR 2d 1139, and *Shakespeare Company* v. *Lippman's Tool Shop Sporting Goods Company* (Mich. 1952), 54 N.W. 2d 268.) In *Sunbeam Corporation* v. *Masters of Miami* (1955), 225 F. 2d 191, the Federal Circuit Court of Appeals for the Fifth Circuit, in commenting on the "strong and consistent declarations of the Florida Supreme Court to the effect that the public policy of Florida is opposed to price maintenance" had this to say:

> We think it may well be that Fair Trade contracts are unenforceable in Florida even between the parties; however, it would seem that this is unnecessary in our decision here and we do not decide that question.

That case also involved non-signers.

The McGuire Act covers agreements "prescribing minimum or stipulated prices". In this respect, it differs from the Miller-Tydings Act which has to do only with minimum prices for resale. Each statute immunizes certain agreements from attack under the Sherman Act but only to the extent that such agreements are lawful in the jurisdiction where the resale is to take place.

The Florida Fair Trade statute provides that a contract relating to the sale or resale of a commodity may lawfully contain a provision "that the buyer will not resell such commodity at less than the minimum price stipulated by the seller". Thus, the authority granted in regard to resale contracts is more limited than that contained in the McGuire Act.

Prior to the adoption of the Florida Fair Trade statute, price fixing was illegal in Florida and the contract under consideration here would clearly have been contrary to law. Even though the statute be considered to be Constitutional and enforceable as to parties to the agreement, it affords exemption from the general laws against price fixing only to the extent provided in the Act, that is, as to the establishment of a minimum price for resale. It does not give a buyer and a seller a free hand to make what contract they wish as to agreed price and thus virtually repeal the general policy of Florida against price fixing.

The agreement between respondent and McLean was not for the purpose of establishing a minimum resale price. On the contrary, it was a contract under which the parties jointly agreed to share the loss of profits incident to selling gasoline at a lower price. It was obviously not made with the Florida Fair Trade Act in mind. Nor can it derive any protection from it. Consequently, the condition laid down in the McGuire Act which is necessary for immunity from Sherman Act attack has not been met and the Act is not available to respondent.

United States v. *Socony Mobile Oil Company* (1957), 157 F. Supp. 202, cited by respondent, is not in conflict with the conclusion herein. In that case, the Court pointed out that under Massachusetts law a wholesaler or distributor has an absolute right to designate the terms of resale and that a producer of

a trade-marked article, which is of a class in open competition, may fix the price at which the retailer may sell. Consequently, the condition necessary for the McGuire Act to become effective is found to exist. In Florida, the opposite is true.

The hearing examiner also found that respondent operates some "company" filling stations in competition with its retailers and that, under *United States* v. *McKesson and Robbins Company, Inc.* (1955) 351 U.S. 305, the agreement between respondent and McLean would not be within the protected area afforded by the McGuire Act.

We agree with the conclusion of the hearing examiner that the defenses based on the Florida Fair Trade Act or the McGuire Act have not been established.

Finally, respondent claims that "the examiner's cease and desist order is unwarrantedly broad and punitive."

Similar objections have been made many times and rejected by the courts. In *Maryland Baking Company* v. *Federal Trade Commission* (1957) 243 F. 2d 716; *Federal Trade Commission* v. *National Lead Company* (1957) 352 U.S. 419; *Moog Industries, Inc.* v. *Federal Trade Commission* (1956), 238 F. 2d 43.

The findings and order of the hearing examiner are adopted as the findings and order of the Commission. Respondent's appeal is denied, and it is directed that an order issue accordingly.

JANUARY 5, 1959.

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Docket No. 6641

IN THE MATTER OF SUN OIL COMPANY, A CORPORATION

INITIAL DECISION

ROBERT L. PIPER, Hearing Examiner.

Rufus E. Wilson, Esq., *Ross D. Young, Jr.*, Esq., and *John B. Clayton*, Esq., for the Commission.

Leonard J. Emmerglick, Esq., of Washington, D.C.; *Moffett, Frye & Leopold*, by *Henry A. Frye*, Esq., of Philadelphia, Pa.; *Rawle & Henderson*, by *Joseph W. Henderson*, Esq., of Philadelphia, Pa.; and *Osborne, Copp, Markham & Ehrlich*, by *Cyril C. Copp*, Esq., of Jacksonville, Fla., for respondent.

STATEMENT OF THE CASE

On September 26, 1956, the Federal Trade Commission issued its complaint against Sun Oil Company, a corporation (hereinafter called respondent), charging it with price discrimination in violation of Section 2(a) of the Clayton Act (hereinafter called the Clayton Act), 15 U.S.C. 12, *et seq.*, as amended by the Robinson-Patman Act, and unfair methods of competition and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act (hereinafter called the Act), 15 U.S.C. 41, *et seq.* Copies of said complaint together with a notice of hearing were duly served on respondent.

The complaint alleges in substance that respondent discriminated in price by the sale of its gasoline to one dealer at prices substantially lower than the prices charged other dealers in the same market area, and that respondent entered into an agreement

with such dealer to fix and maintain the retail price at which he sold said gasoline. Respondent appeared by counsel and filed an answer admitting the corporate, commerce, competition and certain other factual allegations of the complaint, but denying any price discrimination in violation of the Clayton Act or any price-fixing agreement in violation of the Act.

Pursuant to notice, hearings were thereafter held before the undersigned hearing examiner, duly designated by the Commission to hear this proceeding, at various times and places from February 4, 1957, to December 30, 1957.

Both parties were represented by counsel, participated in the hearings and afforded a full opportunity to be heard, to examine and cross-examine the witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, and to file proposed findings of fact, conclusions of law, and orders, together with reasons in support thereof. All parties filed proposed findings of fact, conclusions of law, and orders, together with reasons in support thereof, and pursuant to leave granted presented oral argument thereon. All such findings of fact and conclusions of law proposed by parties, respectively, not hereinafter specifically found or concluded are herewith specifically rejected.[1]

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

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[1] 5 U.S.C. § 1007(b).

Findings of Fact

I. The Business of Respondent

The complaint alleged, respondent admitted, and it is found that respondent is a New Jersey corporation with its principal office and place of business located at 1608 Walnut Street, Philadelphia, Pennsylvania.

II. Interstate Commerce and Competition

The complaint alleged, respondent admitted, and it is found that it is now and for several years last past has been engaged in the offering for sale, sale, and distribution of gasoline in commerce in various states of the United States, including the City of Jacksonville, Florida, and adjacent territories. In the course and conduct of such business, respondent ships or otherwise transports its gasoline in tank cars, tankers, and trucks from its different refineries, terminals and distribution points, located in various states of the United States, to retail dealers located in the Jacksonville, Florida, area, and in various other states of the United States. All of such purchases by said retail dealers are and have been in the course of such commerce. There is now and has been at all times mentioned herein a continuous stream of trade in commerce of said gasoline between respondent's refineries, terminals, and distribution points and said retail dealers. In the course and conduct of this business, respondent is in direct and substantial competition in commerce with other corporations, individuals and partnerships likewise engaged in the sale and distribution of gasoline.

III. THE UNLAWFUL PRACTICES

The complaint contains two counts, one alleging price discrimination in violation of the Clayton Act, and the other alleging price-fixing in violation of the Act, and they are considered *seriatim*.

A. *The Price Discrimination*

The issue here framed is one of alleged secondary-line price discrimination, in that it is contended that respondent sold its gasoline to a particular dealer in Jacksonville, Florida, at prices substantially lower than respondent charged its other dealers in the same market area. Respondent's answer admitted the sale at substantially lower prices to said dealer, but denied that such dealer was in the same market area as other dealers purchasing from respondent or was in competition with such other dealers, and denied that the effect of such discrimination in price may be to injure, destroy, or prevent competition with such other dealers, or others, or that such discrimination was in violation of Section 2(a) of the Clayton Act.

The facts with respect to the price discrimination itself are substantially undisputed. Respondent had some 38 retail dealers in Duval County, Florida, which may for the purposes of this decision be characterized as the Jacksonville area, most of whom were in the City of Jacksonville itself. These dealers are independent contractors who enter into contracts with respondent concerning the purchase of respondent's gasoline and oil, and who operate filling stations at which respondent's products are advertised and sold.

During 1955, Gilbert V. McLean as such an independent contractor operated a Sun Oil filling station located at the intersection of 19th and Pearl Streets in Jacksonville, Florida. In June of 1955, the Super Test Oil Company opened a competing station at the

same intersection diagonally across from McLean's station. As established in the record, Super Test was a so-called "non-major" or "independent" brand of gasoline as compared with so-called "major" companies or "name" brands of gasoline, of which Sun Oil is one. During most of the time from June to December of 1955, the Super Test station sold its "Regular" gasoline at 26.9 cents per gallon while McLean sold his "Regular" gasoline for 28.9 cents per gallon. However, on three or four occasions between June and December of 1955, the Super Test station dropped its price substantially below 26.9, and as low as 21.9 on at least two occasions. Each time this occurred, McLean's sales of gasoline declined substantially. McLean complained several times to respondent about this situation, but nothing was done until December, 1955. During that month the Super Test station reduced its prices several times on weekends, and respondent's salesman, Harry Harper, advised McLean that if it happened again respondent would try to do something.

On December 27, 1955, when McLean was still selling his gasoline for 28.9, Super Test dropped its price from 26.9 to 24.9. The same day respondent gave McLean a price allowance or discount of 1.7 cents per gallon and McLean dropped his retail price to 25.9, thereby reducing his margin of profit by 1.3 cents per gallon, the difference between the discount and the 3-cent reduction in the retail price of his gasoline. Respondent did not give this discount or lower price to any of its other retail dealers in the Jacksonville area. Approximately seven such dealers were in the same sales territory as McLean. This sales territory was one of three in the Jacksonville area established by respondent, and consisted roughly of the north one-third of Duval County. About six of these dealers were relatively close to McLean's

station. This discrimination in price between McLean and respondent's other dealers continued until on or about February 16, 1956, when a price war broke out in the entire area and respondent reduced its wholesale or tankwagon price to all of its dealers in the area.

As a result, McLean's sales of gasoline increased substantially. In October, 1955, he sold approximately 6500 gallons, about the same as his sales in August and September. In November, 1955, he sold 5900-odd gallons, in December, 8300-odd gallons, while in January, 1956, after he reduced his price on December 27, he sold 32,100-odd gallons, almost four times as much as in December and five times as much as he averaged during August, September, October, and November. McLean's daily sales during February, 1956, until he went out of business on or about February 18, averaged approximately the same as January.

Counsel supporting the complaint called four of the Sun dealers who were in the same sales territory in Jacksonville, and the record establishes and it is found that they were in competition with McLean and adversely affected by the discriminatory price allowance granted McLean and denied them. From December 27, 1955 to February 16, 1956, they did not receive the discount given McLean and continued to sell their gasoline for 28.9 cents per gallon while McLean was selling the same product for 25.9 cents per gallon. Respondent contends that these other Sun dealers were not in the same competitive area as McLean, were not in competition with him, and therefore the granting of a lower price to McLean could not have had the effect of lessening competition or of injuring, destroying, or preventing competition with McLean. Respondent also contends that even if such dealers were in competition with McLean, counsel sup-

porting the complaint has failed to establish that the effect of such discrimination may be to substantially lessen competition or to injure, destroy, or prevent competition with McLean, the statutory prerequisites of Section 2(a) of the Clayton Act.

With respect to respondent's first contention, the record establishes the contrary. The four dealers called as witnesses in support of the complaint were Calvin Peery, William Crabtree, Clair Winning, and Jesse McClung. Peery's station was located at the intersection of 11th and Main Streets, three blocks east and eight blocks south, and less than a mile from, McLean's station. There were received in evidence as Commission's Exhibit 21-A and Respondent's Exhibit 5, maps of Duval County and Jacksonville showing the location of the various Sun stations as well as the amount of traffic flow past them. Main Street, as the name connotes, is the main thoroughfare running north and south through Jacksonville, and is also the route of U.S. 17 through Jacksonville. Pearl Street is a main artery running north and south parallel with Main Street, three blocks west of it. According to Respondent's Exhibit 5, while Main Street carries the heaviest volume of traffic, Pearl Street also carries a heavy volume of traffic, approximately one-half as much as Main Street but substantially in excess of the majority of streets in Jacksonville. Much of the traffic from the north and the northwest can proceed to the downtown area alternatively by way of either Pearl or Main Streets, and in the process pass either or both McLean's and Peery's stations, as well as McClung's and Winning's stations, to be considered hereinafter.

From December 27, 1955, until the general price reduction in February, Peery, as well as the others, paid a wholesale price of 1.7 cents per gallon more than McLean. During December, 1955, Peery sold

10,900-odd gallons of gasoline, which was approximately his monthly average for the last six months of 1955. In January, 1956, after the discount to, and price reduction by, McLean, Peery's gallonage dropped to 9300-odd gallons, a decline in excess of 1500 gallons. In fact, on only six days during January did Peery sell as much as he averaged per day during December. Peery was informed not only by Crabtree and McClung but by his own customers as well that McLean was selling Sun gasoline for three cents per gallon less. Peery complained to respondent about this and the discount to McLean but was advised that nothing could be done about it. The loss of customers, as well as the geographic proximity and pattern of traffic flow, clearly demonstrate that Peery's and McLean's stations were in competition with each other. The loss of gallonage clearly demonstrates the effect of the discriminatory allowance and reduced price.

McClung operated a Sun station at the intersection of 35th and Main Streets, east and north approximately one mile from McLean's station. There are eleven streets connecting Main Street with Pearl Street between McClung's and McLean's stations. McClung testified that most of his local trade came from west of his station, which is logical because most of the area east of his station is occupied by a large cemetery. McClung also testified that most local traffic originating west of him used Pearl Street in traveling downtown, which would take them past McLean's station. McClung's credibility was seriously impaired by what proved to be an obvious alteration of his sales records, and accordingly his testimony is not credited unless it is corroborated by the testimony of other witnesses or by established facts. As previously found, the record establishes that there is a substantial flow of traffic from the north and north-

west which can easily choose between Pearl and Main Streets and readily pass either or both McClung's and McLean's stations. Independently of McClung's testimony, the record establishes that McClung was aware of the discrepancy in price occurring at McLean's station, that he and Crabtree called on McLean to ascertain what was occurring, and that McClung complained about the disparate treatment to respondent, which latter fact was admitted by respondent. As with the others, respondent did nothing for McClung.

In spite of the apparent alterations of McClung's sales record for the days in December after the price allowance to McLean, a careful analysis of these records reveals a substantial decline in gallonage during the first two weeks in January. McClung was in redit difficulties with respondent and as a result thereof respondent would not sell him gasoline except for cash. McClung went out of business in the latter part of January, and his operation and sales were not normal after January 14, 1956. An examination of Commission's Exhibit 22–E, McClung's sales records for December, 1955, reveals that the last three gallonage sales figures for December 29, 30, and 31 were altered by reducing the amount of gallonage approximately 276 gallons for the three days. A casual examination of the figures reveals erasures and changes as well as the fact that whoever did so made the mistake of forgetting to make the appropriate changes in the monthly total and in the dollar amounts listed in the column next to the gallonage figures. The first column for December 29 shows 275 gallons with an obvious erasure of the first digit, while the second column shows corresponding receipts of $79.45, with an obvious erasure of another figure appearing underneath. This amount of money is approximately correct for the gallonage listed, but it is apparent that

both figures have been altered. However, on December 30 the gallon figure is 276 with an apparent change in the first digit, whereas the amount received is $108.77, the amount which would have been received for 376 gallons, obviously indicating a change in the first digit from 3 to 2 or a total reduction of 100 gallons. The same thing occurred on December 31—: the first figure has obviously been changed from 402 to 302, whereas the dollar amount remains unchanged and is the correct amount for 402 gallons. In addition, a totaling of all the gallons sold in December appearing at the foot of the column exceeds by 276 gallons the actual figures appearing in the column, but is the correct total if the changed gallonages referred to above are restored to their apparent original amounts. In spite of the foregoing discrepancies, McClung's sales records do show a substantial drop in gallonage, on an average basis, for the first two weeks in January, 1956, compared with his monthly sales prior thereto. The record establishes and it is found that McClung's station was in the same competitive area as and in competition with McLean's station.

As found above with respect to Peery and McClung, and as will be found hereinafter with respect to Crabtree and Winning, the record establishes injury to them by respondent's discrimination. However, it must now be considered well settled that it is not necessary for the Commission to prove injury to competition in a secondary-line price discrimination case because of the meaning of the statutory language, "where the effect may be to substantially lessen competition," as construed by the Supreme Court, the Courts of Appeal and the Commission. In the recent *Sorensen* case,[2] the Commission quoted with approval

[2] *Sorenson Mfg. Co., Inc.*, — F.T.C. —, Docket 6052 (1956).

the holding of the Supreme Court in the *Morton Salt* case,[3] no doubt the leading case dealing with the meaning of the effect clause in a secondary-line price discrimination as follows:

> It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a "reasonable possibility" that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing *in itself* is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence. [Emphasis added.]

The dissent in *Morton Salt*, while preferring the language "reasonable probability" to "reasonable possibility," nevertheless agreed that the facts therein fully warranted an inference of adverse effect on competition without any actual showing of injury. Recent decisions of the Courts of Appeal are to the same effect.[4]

It seems self-evident that where a producer is selling a homogeneous product, such as salt, automotive parts or gasoline, where competition is extremely keen among retailers, and where margins of profit or mark-ups are small, a lower price to one or some of such competing retailers not only "may" but must have the effect of substantially lessening competition.

Crabtree operated a Sun station at 58th and Main Streets, east and north approximately two and one-

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[3] *FTC* v. *Morton Salt Co.*, 334 U.S. 3 (1948).

[4] *Moog Industries, Inc.* v. *FTC*, 238 F. 2d 43 (C.A. 8, 1956); *Edelman & Co.* v. *FTC*, 239 F. 2d 152 (C.A. 7, 1956), cert. den.

half miles from McLean's station. As previously found, the flow of traffic in either direction easily could alternate between Main and Pearl Streets and readily pass either or both such stations. Crabtree's gallonage fell off substantially in January after the price allowance to McLean on December 27. Crabtree sold approximately 17,000 to 18,000 gallons per month the last four months of 1955, but in January his gallonage dropped to 14,500. About January 1 Crabtree discovered that McLean was selling Sun gasoline for three cents per gallon less and visited McLean to find out why. While Crabtree was present at McLean's station, he helped McLean pump gas and waited upon, and talked to, several of his own former customers, who told him they were buying at McLean's station because of the lower price. It is difficult to conceive of more direct evidence of both competition and effect than this. Subsequently Crabtree and McClung together visited McLean and discussed the price situation with him and ascertained that he was receiving a price allowance from respondent. Crabtree, too, complained to respondent about the price discrimination but received no assistance until the general price reduction on February 16, 1956.

Winning operated a Sun station at 8028 Lem Turner Road, approximately three and one-half miles northwest of 19th and Pearl. Lem Turner Road is a main artery from the northwest section of Jacksonville feeding directly into Pearl Street a few blocks north of McLean's station, so that most of the traffic headed for downtown which passes Winning's station would also pass McLean's. Respondent's Exhibit 5 reveals that Lem Turner Road carries a high traffic flow, approximately one-half as large as that carried by Main Street. Winning was advised of the lower price for Sun gasoline at McLean's station by Win-

ning's own customers. Winning stated that a number of his customers, four of whom he identified by name and address, told him they could purchase the same gas for three cents less at McLean's and thereafter stopped buying from him for about one month. Winning's gallonage did not drop substantially in January. However, he testified that he worked much harder and tried to improve his service in an attempt to prevent any substantial loss of business. The indirect effect upon Winning is demonstrated by the fact that in February, after he received the price discount for the first time when the general price war broke out, his gallonage jumped from 410 gallons one day to 903 the next and stayed at such levels for several months.

As was pointed out by the witness Peery, the loss of customers to McLean also had an effect upon the sale of other items such as oil, tires, batteries, and accessories. While respondent contends that the price differential at McLean's station could have no effect upon its other dealers because they were not in the same competitive area, which respondent would limit to a very small area adjacent to and in the immediate vicinity of 19th and Pearl Streets, in addition to the facts found, hereinbefore, one of respondent's principal witnesses, its vice-president, Willard Wright, in testifying before a Senate Small Business Subcommittee in 1955 on behalf of respondent, had this to say:

> Keen competition always has existed in the marketing of gasoline in most parts of the country. Motorists are particularly price conscious when they buy gasoline. Americans of all income brackets own and operate automobiles. For those in the lower brackets gasoline is an important item in their family budgets and they seek opportunities to reduce the cost of that item.

> Moreover, unlike consumers of most commodities, motorists are mobile. They can without trouble drive several blocks down the street to another service station, if the first fails to please them. Indeed motorists will go out of their way a mile or two to save two or three cents on a gallon of gasoline. Out on the open highways, motorists sometimes drive past 10 to 20 stations before they stop at one whose appearance and posted prices suit them.
>
> Naturally the sellers of gasoline respond to these characteristics of their customers. Alert service station operators keep a sharp eye on the prices of their competitors and price changes, particularly on the downside, are quickly followed. Delay in doing so inevitably would mean a loss of business. Volume is important to the dealer because many of his operating costs are more or less fixed, irrespective of the number of gallons of gasoline he sells. Any substantial drop in volume means an increased unit cost of doing business.[5]

The fact that the effect of respondent's price discrimination "may be to substantially lessen competition" was fully elucidated in a recent Federal court decision, the *Enterprise* case,[6] where Judge Smith said, with respect to facts substantially similar to those herein: "The effects on gallonage of price differentials in the same brand and grade of gas within an area no larger than the Greater Hartford area must be found to be substantial."

In addition to its foregoing contentions, respondent also urges that its lower price was given to McLean in good faith to enable respondent to meet competition, as provided in Section 2(b) of the Clayton Act. For several reasons this contention is without

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[5] Commission's Exhibit 14–C.

[6] *Enterprise Industries, Inc.* v. *The Texas Company*, 136 F. Supp. 420 (U.S.D.C., Conn. 1955).

merit. First and most importantly, as found by the Court in the *Enterprise* case, *supra*, and as clearly evidenced by the decision of the Supreme Court in the *Standard Oil* case, the proviso in 2(b) has reference to the good faith meeting of competition of the *seller*, and not the competition of the buyer, as in this case. Exactly the same contention was made and disposed of in the *Enterprise* case, where the Court said:

> Moreover, Texas could justify discrimination only by a showing that it dropped its price to the other stations to meet an equally low price made available to those other stations by a competing oil company * * *. That is the competitive level at which the justification is provided for defendant in the Act, however. The Act does not go so far as to allow discriminatory price cutting to enable a *buyer* to meet price competition, but only to enable the seller to meet a lawful price of the *seller's* competitors.

The decision of the Supreme Court in the *Standard Oil* case, *supra*, clearly establishes that the price which a seller may in good faith meet is that offered to a customer of the seller by the seller's competitor.

It is true, of course, as respondent argues, that where one or some of its dealers are faced with ruinous price competition respondent must take some action or suffer the loss of such dealership and respondent's sales thereto. Respondent would equate its dealers' competition with its own competition, but of course this is not the law and cannot justify price discriminations injuring others. Respondent could, if it chose to, meet such competition at the dealer level by nondiscriminatory reductions in price to all dealers, or by operating its own stations and thus being in direct competition with other stations which re-

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[7] *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951).

duce prices. Respondent's argument is essentially one of difficulties and problems claimed to have been brought about by the statute, which is not for the Commission to pass upon and more properly should be directed to Congress.

The second reason negating respondent's attempted reliance upon Section 2(b) is that the lower price at which respondent sold its gasoline to McLean was not made in good faith to enable McLean to *meet* his price competition. With regard to this, there is considerable evidence in the record concerning a contention by counsel supporting the complaint that the usual and customary price differential between so-called regular major gasoline and regular nonmajor gasoline is two cents a gallon. There is also considerable evidence in the record that the price differential between the two is frequently one cent a gallon. Suffice it to say that there is not sufficient reliable, probative and substantial evidence in the record to establish what, if any specific amount, is the usual and customary differential between major and nonmajor regular brands of gasoline. However, the record does establish that the usual differential between McLean's station and the Super Test station across the street was two cents a gallon. McLean unequivocably, testified that such a differential did not harm him competitively, but that when the differential was greater it caused him substantial injury. The record establishes that respondent gave McLean a 1.7-cent price allowance in order to enable him to post a price of 25.9, or one cent above the price to which Super Test had cut its gasoline. In the light of McLean's undisputed testimony, it is apparent that this was more than a good faith meeting of competition, even assuming *arguendo* such defense to be applicable, but was in effect a boating of competition which, of course, is not permitted by Section 2(b) of the Clayton Act.

The proviso is after all a proviso and can only justify price discriminations when made in good faith to *meet* competition; and as such obviously cannot justify price discriminations in excess of those necessary to meet competition.[8]

The third reason the 2(b) defense is not applicable here is that the lower price at which respondent sold its gasoline to McLean was not made in *good faith* to enable McLean to meet his price competition. As is found hereinafter in Section III–B, in connection with the granting by respondent of the discount to McLean, respondent and McLean entered into an agreement fixing the retail price at which McLean would resell the gasoline. Section 2(b) provides a defense to a seller if his lower price is made in "good faith" to meet an equally low price of a competitor. Numerous decisions have emphasized the fact that such a lower price must have been made in good faith and have even held in this regard that the price met must be a lawful one. It is apparent that a lower price granted as consideration for an illegal agreement to fix prices could under no circumstances be considered as one made in good faith.

A preponderance of the reliable, probative and substantial evidence in the entire record convinces the undersigned, and it is found, that respondent by engaging in the above-found acts and practices has discriminated in price between different purchasers of commodities of like grade and quality, and that the effect thereof has been, is, and may be substantially to lessen competition and to injure, destroy, and pre-

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[8] *Porto Rican Tobacco Co.* v. *American Tobacco Co.*, 30 F.2d 234 (C.A. 2, 1929); *Moss, Inc.* v. *FTC*, 148 F.2d 378 (C.A. 2, 1945); *Anheuser-Busch, Inc.*, —— F.T.C. ——, Docket No. 6331 (1957); Cf. *Standard Oil Co.* v. *FTC*, 340 U.S. 231 (1951).

vent competition with other retailers of respondent's gasoline, in violation of Section 2(a) of the Clayton Act. It is further concluded and found that such price discrimination was not made in good faith to meet an equally low price of a competitor.

B. *The Price-Fixing Agreement*

As previously noted, Count II of the complaint alleged that respondent and McLean entered into a combination, understanding and agreement through which they fixed and maintained the retail price at which McLean sold his gasoline. It is undisputed in the record that McLean was an independent contractor with sole and exclusive authority to fix the retail price at which he sold his gasoline. The same incident on December 27, 1955, when respondent granted a discount to McLean, is also alleged as the price-fixing arrangement between respondent and McLean. As previously found, from August to December of 1955, McLean complained several times to respondent about the price cutting by the Super Test station across the street. Until December 27, each time McLean complained to respondent's agents, he was advised that there was nothing they could do about it. Respondent employs salesmen who, among other things, call upon the filling station operators in their territory. Prior to December 27, McLean had been contacted by salesman Elbey and Harper and also by Edward Beardsley, respondent's district manager.

The testimony of respondent's witnesses reveals that respondent had the situation at 19th and Pearl Streets under careful consideration for some time. McLean had made it clear that unless something was done to meet the Super Test competition he would be forced out of business. Beardsley advised Maximilian Dietshe, respondent's regional manager, of the

situation, and Dietshe in turn advised Willard Wright, respondent's vice-president at its home office in Philadelphia. After consideration of the situation and examination of the facts, they were all in agreement that something would have to be done to help McLean. McLean testified that on December 27 Harper contacted him and advised him that if Super Test dropped its price again respondent would try to do something. Later the same day after Super Test dropped its price, Harper returned and advised McLean that he would be given a price adjustment of 1.7 cents if he would absorb 1.3 cents himself and drop his retail price to 25.9. As previously found, McLean had been selling his gasoline at 28.9. His gross margin of profit or difference between wholesale and retail price had been 4.8 cents per gallon. As a result of dropping his price to 25.9 and absorbing 1.3 of this reduction, his gross margin of profit was reduced to 3.5 cents per gallon.

The key issue is, of course, just what arrangement or understanding was reached between respondent and McLean on December 27. Respondent contends, and its officials so testified, that there was no agreement with McLean concerning his retail price and that he voluntarily and unilaterally elected to post a price of 25.9 cents and take a cut in profit of 1.3 cents. McLean, too, testified that there was no "agreement" between him and respondent to fix his retail price, but his testimony concerning what was actually said and done on December 27 reveals quite clearly that there was an agreement entered into between respondent and McLean fixing the price at which he would sell his gasoline in consideration of being granted a price allowance or discount by respondent.

McLean testified that he was required to take a 1.3-cent cut in profits in order to get the adjustment. Again, after testifying that there was no "agreement"

to fix his retail price at 25.9 cents per gallon, McLean testified as follows:

> Q. So that was a reduction of three cents a gallon?
>
> A. Yes, sir.
>
> Q. Did Mr. Harper or any representative of the Sun Oil Company say to you that they would attempt to keep this differential of three cents?
>
> A. No, sir, not that I remember.
>
> Q. But on that particular time, did he say that to you?
>
> A. It was *made* that I wanted and *they stated* that I drop my gas to that price according to Super Test across the street, but as far as dropping it any lower or raising it—[Emphasis added.]

It is clear from the testimony of McLean that he was required by respondent to take a cut in profits of 1.3 cents per gallon, i.e., to post a price of 25.9 cents per gallon, in order to secure the price discount of 1.7 cents per gallon from respondent. Harper, respondent's agent who made this arrangement with McLean, was not called as a witness, and accordingly McLean's testimony stands undisputed.

In addition to McLean's direct testimony concerning the arrangement, the factual circumstances surrounding it also lead inevitably to the conclusion that McLean did not voluntarily and unilaterally post the price of 25.9 cents, but did so as the result of an agreement with respondent in order to obtain the price assistance. It has previously been found, as McLean himself testified, that he was not hurt competitively as long as the price difference between his station and the Super-Test station did not exceed two cents a gallon. In addition to his testimony to that effect, undisputed stat 'ical facts in the record clearly reveal that McLean was not hurt competitively

when the difference between his price and Super Test's was two cents per gallon. This is dramatically illustrated by what happened after December 27.

When McLean cut his price to 25.9 cents on December 27, Super Test was selling its gasoline at 24.9. On January 3, 1956, approximately one week later, Super Test dropped its price to 23.9, and thereafter for substantially the entire month of January a two-cent differential existed between McLean's and Super Test's prices. Nevertheless, although the record reveals that Super Test's gallonage at 19th and Pearl had been averaging between 10,000 and 11,000 gallons per month up to December and was approximately 19,000 gallons in December, during which month Super Test cut its price several times, in January, 1956, Super Test's gallonage jumped to 61,000-plus gallons and McLean's gallonage jumped approximately four or five times in excess of the preceding months. These facts make it abundantly clear that it was not necessary for McLean to reduce his price to within one cent of Super Test in order to be competitive, inasmuch as after a price reduction his gallonage increased tremendously during a month when for all but two days the difference in price between McLean and Super Test was two cents per gallon. If McLean had not been required to reduce his price to 25.9 in order to receive the 1.7-cent allowance from respondent, he could have reduced his price to 26.9, within two cents of Super Test's price, not have been hurt competitively, and yet retained a margin of four and one-half cents per gallon, thereby reducing his gross profit only .3 cents per gallon. If he had done this, it is clear from the record that his competitive situation would not have been injured and he would have maintained a much more adequate margin of profit.

McLean told Crabtree and McClung when they contacted him concerning his lower prices that he was very dissatisfied with the arrangement because while he was selling a lot of gasoline he was doing a lot of work and not making much profit. This is corroborated by the fact that although McLean substantially increased his gallonage in January and February, on or about February 18 he gave up and went out of business. It is apparent that if McLean had retained unilateral control of his retail price, he could have reduced his price to within two cents of Super Test, retained substantially all of his margin of profit, and substantially increased his gallonage because that is exactly what happened during January with a reduced price and a two-cent differential between the stations.

It is well settled, and requires no extended discussion, that price fixing, no matter in what manner, shape, or form, and regardless of the motivation, is illegal *per se*.[9] The following comments of the Supreme Court in the *Socony-Vacuum* case[10] seem appropriate here:

> * * * But the thrust of the rule is deeper and reaches more than monopoly power. Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering

[9] *Ethel Gas Corporation* v. *U.S.*, 309 U.S. 436 (1940); *U.S.* v. *Socony-Vacuum Oil Company*, 310 U.S. 150 (1940); *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384 (1951); and *Virginia Excelsior Mills, Inc.*, — F.T.C. —, Docket No. 6630, October 25, 1957.

[10] Footnote 9, *supra*.

with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference.

* * * * *

Nor is it important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible. Price-fixing as used in the *Trenton Potteries* case has no such limited meaning. An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price-fixing was used. * * * Hence, prices are fixed within the meaning of the *Trenton Potteries* case if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices. They are fixed because they are agreed upon. And the fact that, as here, they are fixed at the fair going market price is immaterial.

While it has been found above that there is direct evidence of the price-fixing agreement, it is settled law that such an agreement also may be proven by circumstantial evidence,[11] as also found above. It further has been held by the Supreme Court that business behavior is admissible circumstantial evidence from which the fact-finder may infer agreement.[12]

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[11] *United States Maltsters Assn.* v. *FTC*, 152 F. 2d 162 (C.A. 7, 1945); *Milk & Ice Cream Can Institute* v. *FTC*, 152 F. 2d 478 (C.A. 7, 1946); *Fort Howard Paper Co.* v. *FTC*, 156 F. 2d 899 (C.A. 7, 1946); *Allied Paper Mills* v. *FTC*, 168 F. 2d 600 (C.A. 7, 1948); *Triangle Conduit & Cable Co.* v. *FTC*, 168 F. 2d 175 (C.A. 7, 1948) aff'd, 336 U.S. 956; and *National Lead Co.* v. *FTC*, 227 F. 2d 825 (C.A. 7, 1955).

[12] *Interstate Circuit, Inc.* v. *U.S.*, 306 U.S. 208 (1939); and *Theatre Enterprises, Inc.* v. *Paramount*, 346 U.S. 537 (1954).

In addition to denying that it had engaged in price fixing, respondent contends that even if it had it was not in violation of the Act because of the amendment of Section 5 by the McGuire Act authorizing pursuant to State laws fair trade agreements prescribing minimum or stipulated prices for the resale of branded products. The short answer to this contention is that the Florida Fair Trade Act was held unconstitutional as to nonsigners by the Supreme Court of Florida.[13] This decision, as well as numerous others, makes it clear that the McGuire Act amendment refers only to written agreements or contracts for fair trade prices, and, of course, there was no written agreement here. In addition, the Supreme Court in the *McKesson-Robbins* case[14] held that a corporation which both manufacturers and wholesales a product cannot, under the Miller-Tydings or the McGuire Acts, enter into fair trade agreements with wholesalers because in effect such agreements would be between competitors and hence in violation of Section 5(a)(5) of the Act. Respondent itself operates certain filling stations known as company stations, and accordingly if there were any fair trade agreement, it would be in violation of Section 5(a)(5) of the Act and no defense to a price-fixing agreement.

A preponderance of the reliable, probative and substantial evidence in the entire record convinces the undersigned, and accordingly it is found, that respondent and McLean entered into, maintained and carried out a planned common course of action, agreement, combination, or understanding to fix and maintain the retail price at which McLean was to sell gasoline, all to the prejudice and injury of the public.

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[13] *Miles Laboratories, Inc.* v. *Eckerd*, 73 So. 2d 680 (Fla. Sup. Ct. 1954).

[14] *U.S.* v. *McKesson & Robbins, Inc.*, 351 U.S. 305 (1955).

respondent's competitors, and McLean's competitors, which constitutes an unfair method of competition and an unfair act and practice in commerce within the intent and meaning of Section 5 of the Act.

Conclusions of Law

1. Respondent is engaged in commerce, and engaged in the above-found acts and practices in the course and conduct of its business in commerce, as "commerce" is defined in the Act and the Clayton Act.

2. The effect of the acts and practices of respondent hereinabove found in Section III–A may be and has been to substantially lessen competition, and to injure, destroy, and prevent competition with the recipient of respondent's discrimination, such acts and practices constituting a violation of Section 2(a) of the Clayton Act.

3. The acts and practices of respondent hereinabove found in Section III–B are all to the prejudice and injury of the public and competition, and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Act.

4. As a result thereof, substantial injury has been done to competition in commerce.

5. This proceeding is in the public interest, and an order to cease and desist the above-found acts and practices should issue against respondent.

Order

It is ordered, That respondent Sun Oil Company, a corporation, its officers, directors, agents, representatives or employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of its products in com-

merce, as "commerce" is defined in the Act and the Clayton Act, do forthwith cease and desist from:

A. Discriminating in price by selling such products of like grade and quality to any purchaser at net prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of respondent's products;

B. Entering into, continuing, cooperating in, or carrying out, or attempting so to do, any planned common course of action, understanding, agreement, combination, or conspiracy with any person or persons not parties hereto, to attempt to, or to establish, fix, adopt, maintain, or adhere to, by any means or method, prices at which said product is to be resold;

C. Granting any discounts, rebates, price reductions or other form of consideration for the purpose, or with the effect, of fixing or maintaining the prices at which said product is to be resold.

Provided, however, That nothing herein contained shall be construed to limit or otherwise affect any resale price maintenance contracts which respondent may enter into in conformity with Section 5 of the Act as amended by the McGuire Act (Public Law 542, chapter 745, 82nd Cong., 2d Session, approved July 14, 1952).

ROBERT L. PIPER,
Hearing Examiner.

APRIL 29, 1958.